CRIMINALIZATION OF FLIGHT AND ESCAPE AID

borderline-europe
Sara Bellezza and Tiziana Calandrino

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contact: *borderline-europe* – Menschenrechte ohne Grenzen e.V.
Gneisenaustr. 2a, 10961 Berlin
Mail: mail@borderline-europe.de

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INHALT

BY WOLFGANG KALECK
GENERAL SECRETARY EUROPEAN CENTER FOR
CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR)

The increasing migration movements, especially from Afghanistan, Syria and Iraq in 2015 accelerated the collapse of Europe´s migration management. However before the "long *summer of migration*" its performance has already been rather poor and aimed above all at one thing: To hinder politically prosecuted, civil war refugees and people who fled their homes for other reasons to reach Europe. Increasingly sophisticated border security strategies and structures for example at the Spanish-Moroccan border in Ceuta and Melilla or the changing regulations regarding migration on the Mediterranean route to Italy fostered mainly two promising lines of business: The mainly European security industry on the one hand and diverse actors, such as organized individuals, gangs, organizations or networks along the escape routes on the other.

The European Union, the Nobel Peace Prize winner of 2012, claims to respect and foster the rule of law and to guarantee the access to the law for everyone. However, on the ground these values seem to fall by the wayside. In other words: Europe´s asylum and migration policies deprive many of those reaching the borders of their right to have rights. Thousands of people are - in the true sense of the word - left by the wayside, those who drowned or got stuck on the Mediterranean route as well as those at the far less reported land routes through Africa. Noteworthy are people who try to escape the brutal conditions in Somalia, Eritrea, Nigeria or Sudan and often face rape, ill-treatment and blackmailing along their routes to the southern fringes of the Mediterranean.

Indeed, now in spring 2017 the situation further worsened in terms of border securitization at the EU´s external borders. Countries like Bulgaria and Hungary not only blatantly violate European and national law but question the rule of law in general. Ill-treatment is not anymore only appearing beyond the Mediterranean. But is increasingly happening in the course of Europe's continued closed-border policies. Hungary with its recently introduced mandatory detention policy of all asylum seekers, including many children above 14, for the entire length of the asylum procedure is one example in this regard. Incidents like the push-back operation of the Spanish Guardia Civil in Ceuta, which lead to the death of at least 15 refugees and migrants on 6 February 2014 another.

The security lens used by European policy makers effectively excludes a broader understanding of the reasons why people actually flee and the human rights obligations based on the *European Convention of Human Rights (ECHR)* towards those arriving. Instead of assisting those in need and offering legal passages to Europe, borders are continuously sealed. Therefore, we need to defend the most basic rights of those who migrate to Europe.

The topic of this anthology at hand deals with a very important aspect in this regard: If there are no legal ways to migrate to Europe, be it for refugees or people who leave their homes for other reasons, people will have to find other ways to reach their destination. Just like generations of individuals and refugee communities, like immigrants from Europe have done before them. In other words: Because the European migration management is solely aimed at repression and to minimize the number of people reaching Europe, they had to find alternative ways to enter Europe and rely on the help of quite different people and groups.

Nowhere this is more obvious than in the country report of *Borderline Sicilia* in this anthology which documents the criminalization of humanitarian rescue operations at sea (see chapter 2.3.). The case of the *Cap Anamur* and the criminalization of the crew for rescuing people in distress in accordance with international maritime law and bringing them to a "safe harbor" in Italy is a striking example in this regard. Also, the manifold political, social and family networks assisting people to cross European borders are by means of generalized and broadly discriminatory laws made liable to criminal prosecution in the same way as criminal associations, as outlined in all of the four country reports. This approach distracts the focus from the obvious failure of the European asylum system to a group of people, certainly also including criminals like violent gangs, corrupt government officials and other figures. The obscure results of the contemporary discourse – which this anthology analyses – leads to twisted arguments such as those of Austrians Foreign Minister Sebastian Kurz: he proclaimed that "we have to stop the NGO madness" and condemned NGO´s for their humanitarian assistance in the Mediterranean, accusing them of being responsible for the deaths of migrants by acting as partners of smugglers. This is not an isolated case but follows earlier remarks by Fabrice Leggeri, Director of the European Border and Coast Guard Agency (EBCG), commonly known as *Frontex*. This booklet and the transnational cooperation of *Borderline Sicilia* (Italy), *borderline-europe* (Germany), *Asyl in Not* (Austria) and Diktio (Greece) in the Project *Controversies in European Migration Policies* is an important contribution to lay bare Europe's failed asylum and migration system.

1. INTRODUCTION *by Tiziana Calandrino (borderline-europe)*

In recent years, irregular entries to EU-Europe[1] have come to dominate the EU-European migratory agenda. Political approaches concerning irregular entries also expose deep divisions between fundamental human rights and current EU-European migratory regimes, where those searching for protection encounter border controls that make it almost impossible for them to exercise their right to seek asylum. The aim of the project *Controversies in European migration policies – Granting Protection vs. Border Control* is to analyze this phenomenon from a multidisciplinary perspective. Within the framework of the EU program *Europe for Citizens*, this project was conducted by several NGOs all around Europe: *Asyl in Not* (A), *Borderline Sicilia* (I), *DIKTIO* (GR) and *borderline-europe* (D). The project ran from 01.10.2015 to 31.03.2017. During this time, all partners were involved in the research of ongoing European controversies regarding "illegal"[2] entries, and especially regarding the trials of "suspected smugglers." From Germany to Greece and from Austria to Italy, we sought to understand irregular entries and the fight against "smuggling" in a context where international, EU- European and national laws and policies overlap.

1. "HUMAN SMUGGLING": A DIFFICULT DEFINITION

In spring 2015, "Human Smuggling" became one of the key topics in EU-European migration and border policies. The incident in the night from 18th to 19th April 2015, when nearly 900 people died on their way to EU-Europe in the Mediterranean Sea, has been one of the biggest

1 We use the term Europe in distinction to the term EU-Europe in order to clarify that not every European State belongs to the European Union and its policies. Therefore, by using the term Europe, we refer to the geographical definition of the continent, and by using the term EU-Europe, we refer to the geopolitical space of the European Union and its Member States.

2 We consider the term "illegal" as a socio-political constructed status and not as an objective descriptor. By using square quotes or by using the term illegalized, we situate the term historically to avoid any naturalizing use of illegality as a timeless attribute of a person.

tragedies in recent history causing a massive media echo. The former Italian Prime minister Matteo Renzi called for a summit meeting with leading EU-European officials in order to develop strategies against the deaths on the Mediterranean Sea.[3] With the worsening of the Syrian war in 2011 which forced more and more people to flee, migration became an urgent topic to be addressed in EU-European Union politics. Also, illegalized migration and the criminalization of the facilitation of border crossings were intensively punished since then. The Italian government introduced the military operation *Mare Nostrum* in 2013, which saved approximately 150,000[4] migrants in distress until its end of action in 2014. Due to the political pressure from several Member States accusing *Mare Nostrum* of serving as a pull factor for irregular migration to EU-Europe, the program was replaced by the *Frontex* operation *Triton*. *Triton* operated with a lower financial budget and within a smaller radius of operation. This led immediately to an increased number of migrant fatalities in the Mediterranean. As a response to the crisis of legitimacy resulting from the EU's repressive approach to irregular migration, EU leaders blamed "smugglers" for the deaths in the Mediterranean Sea, and decided on a common EU-European combat against "smuggling" criminality. A draconian, morally loaded public discourse emerged around the term "smugglers" which was used interchangeably with "traffickers." The so-called "smugglers" were framed as organized criminals, violating and abusing migrants, forcing the latter to rely on precarious means of transport, while their only concern was their own profit. Since then, several strategies have rapidly been enforced: The *Ten Point Action Plan On Migration*, the *EU Action Plan against Migrant Smuggling*, the military mission *EUNAVFOR MED* and finally the *EU-Turkey Deal*.

3 http://www.taz.de/!5011840/. [Last access 19.03.2017]

4 http://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor. [Last access 19.03.2017]

However, human smuggling, or better said, the facilitation of border crossings is not a new phenomenon: it has existed ever since borders have existed. People who flee rely on information, experiences or even material help from others to succeed in their purposes. Assistance becomes even more necessary if there are no legal ways to enter a territory, as it is the case for many migrants and refugees who try to reach Europe. The emergence of informal economies, which provide the service of border crossings, is a logical consequence as there is a market for those still trying to cross borders.

However, the criminalization and penalization had already begun during the 90's, when the first so-called "refugee crisis" since World War II occurred in Europe. Already at that time, a push towards the criminalization and penalization of the facilitation of free movement could be observed. Several international agreements such as the UN *Protocol Against Migrant Smuggling* and the EU-European *Facilitators' Package* were ratified, and many legislatures of EU Member States introduced offences that criminalize the facilitation of border crossing into their penal codes. The newly emerging legal and political framework also gave rise to new discourses about "human smugglers." Today most "human smugglers" are conceived as criminals that threaten the states' capacity to manage migration, and the wellbeing of those on the move (Van Liempt, 2016).

Over the years, besides reports on internationally acting "human smugglers," several cases have also emerged where individuals have been criminalized as "human smugglers" enabling the illegalized entry of migrants for humanitarian reasons. There have been cases of members of an NGO or fishermen rescuing migrants in distress on the Mediterranean Sea, and of people trying to bring their friends and families together. Other cases involved people, who created migration broking businesses similar to travel agencies in order to earn money, while taking good care of their clients. Humanitarian aid and the promotion of

a successful border crossing for migrants were increasingly prosecuted under the "smuggling" offense and raised attention amidst activists. Our research finds that this phenomenon is more complex than usually suggested, and that "suspected smugglers" may act due to a variety of motivations: they might seek to help people in distress, bring family members across borders, or might act according to personal or political values. Therefore, our project focuses on the different modes of criminalizing assistance to escape on a legal level. We analyze the political strategies of the EU and its Member States which criminalize the facilitation of the freedom of movement and rescue operations. Furthermore, looking at four EU- European countries, we provide an overview of the different motivations as well as of the legal and political approaches in cases where people have been arrested under the suspicion of being "smugglers." The centerpiece of our work is the intense fieldwork conducted in relation to the cases in Germany, Austria, Italy and Greece and our reflection of how to embed the observed court cases and political developments into the EU-European context. A further important aspect was to open the debate to the broader EU-European public, to initiate a discussion on "smuggling" that goes beyond its simple criminalization.

2. ANALYZING CONTROVERSIES WITHIN EU-EUROPEAN MIGRATION AND BORDER POLICIES

In recent years, EU-European policy making has been characterized by the involvement of multiple actors. The EU, as a supranational actor, together with the respective national Member States, contributed to the EU-European integration and political harmonization processes that shape today´s migration politics. Several agreements were implemented to protect the inner-EU-European market, to prevent "uncontrolled" migration flows, harmonize juridical measures in the Member States and guarantee the security of the EU territory. The multilateral Schengen agreement from 1985 led to the construction of the EU-Eu-

ropean external borders, which therewith made common border policies necessary. In 1997, the treaty of Amsterdam declared the EU to be a "common space of Freedom, Justice and Security."During the EU council meeting in Tampere in 1999, concrete steps were taken to create a common Space of Freedom, Justice and Security. Common migration and asylum policies were now officially decided upon together and a focus was put on managing legal and combating "illegal" migration by preventing "human smuggling criminality."[5]

However, we do not consider the Europeanization of migration and border politics as a linear process of harmonization (Hess/ Tsianos, 2007: 26). Instead the EU-European migration and border policies are better understood as a regime which comprises a multiplicity of actors in developing political strategies concerning the migration and border politics (Karakayali/Tsianos, 2007). In the border regime, migration is tried to make governable by managing and controlling mobility,[6] which is however challenged by people forced to move. As the EU migration regime tries to restrict their mobility and maintain or establish a stable control system, the mass movement of people, especially during the *Summer of Migration*, threatened to destabilize the system which was per se dysfunctional. The recent developments testify to ever more restrictive EU-European asylum laws which make it impossible to enter let alone to stay in EU-Europe legally. This leads to the increasingly securitized and militarized border controls at the cost of life of the people forced to move. The regime therefore needs to be understood as

5 http://www.europarl.europa.eu/summits/tam_en.htm. [Last access 27.02.2017]

6 The controlling and management of migration is based on the consent of neoliberal and neo-national positions within the European Union. While neoliberal positions do not reject migration per se, it is rather aimed at controlling and managing it according to labour market logics and economic growth. An example is the demographic change in Europe which is shaped by a raise of the age average. Within this logic, migration is required in order to maintain European economic and welfare systems (Cuttita, 2010: 29). Neo-national positions, on the other hand, reject migration per se as it poses a threat to a homogeneous national identity, the national prosperity and state authority. However, both positions endorse a combat of "illegal" migration and a development towards a security state (Feldman, 2011: 26).

a contested process of political negotiation between Member States, supranational institutions such as the EU, migration movements and actions of resistance such as political movements fighting for the freedom of movement and the right to stay for people. While the EU and its Member States are constantly negotiating how much decision-making power should remain within the realm of the nation-states and how much should be shifted to supranational actors, we want to highlight the power of the civil society to resist and challenge restrictive and deadly border politics. Therefore, we consider the criminalization of "human smuggling" as one strategy to legitimize human rights violations in order to combat and control illegalized migration. By capturing the complexity of the criminalization of escape assistance within the interplay of stabilizing and destabilizing the border regime, we are aiming to provide a multidisciplinary perspective. On the one hand, our analysis is based on a transnational perspective, by giving an overview of international and EU-European developments concerning the criminalization of human smuggling and on the other hand, the report provides a national perspective of the investigated countries asking how international and EU-European agreements are incorporated in national legislations. In doing that, we chose four categories to analyze the criminalization of "human smuggling": 1) the discursive, legal development of the international, EU-European and national "smuggling" offense, 2) political strategies to combat "human smuggling" in the European Union as well as the four chosen Member States, 3) the juridical practice in each researched country and 4) the counter-movements, combating the criminalization of "human smuggling."

3. OVERVIEW OF THE REPORT

Discursive-legal development

The facilitation of border crossings has not always been denounced as a transnational organized crime. As we will see, the discourse around

the facilitation rather changes depending on historical or political circumstances. In order to explain the criminalization of assistance of irregular border crossing, we will highlight the role of hegemonic narratives, which are essential for advancing repressive political strategies against free movement in the name of combating "human smuggling."

As already mentioned, the discourse around facilitation of border crossings began to play a crucial role during the 1990s. Taking this period as a starting point of our analysis, the report opens with an overview on the discursive-legal development in international and EU-European law. Chapter 2.1. will examine the emergence and development of the *Smuggling of Migrants Protocol* and look at how the terms "smuggling" as well as "trafficking" are used and defined in international law. Next, we will examine the concept of human smuggling in EU legal frames, which use the term "facilitation of entry" rather than "smuggling." Finally, we will compare the UN *Smuggling of Migrants Protocol* with the EU *Facilitators' Package* to demonstrate how they differ.

Chapter 2.2. *The emergence of the legal trope "smuggling" and its consequences* discusses five case studies taken from the four countries examined in this report: Germany, Italy, Austria and Greece. The cases demonstrate the criminalization of people who have facilitated the illegalized entry of other people for humanitarian reasons. We therefore discuss how the development of the legal trope of "smuggling," i.e. the negatively connoted "smuggler" narrative and the ability to legally combat "smugglers" in international as well as EU- European legal frameworks, has been instrumentalized to combat illegalized migration before the 2015 "refugee crisis."

Implementation of political strategies

Chapter 2.3. *Current Political Strategies* examines the political strategies imposed after the shipwreck in spring 2015. The chapter will outline

different EU-European policies and actions taken to combat smuggling and implement military interventions in the Mediterranean Sea between 2015 and 2017. In doing so, we draw on EU-European policy papers, which aim to combat the criminalization of human smuggling as a common EU-European target. Additionally, we will present further actors and strategies such as *Frontex* and the military operation *EUNAVFOR MED* as well as the *EU-Turkey Deal*, all contributing to the criminalization of human smuggling.

National specificities in relation to international agreements and EU-European migration and border policies

Even though the four researched countries are signing partners of the *UN Protocol Against Migrant Smuggling* and despite all harmonizing attempts in the European Union to develop common migration and asylum policies, such as by introducing the EU-European *Facilitators' Package*, the criminalization of "human smuggling" varies in the different EU-European Member States. Each country has its own migration history and hence nationally individual discursive and legal developments towards criminalizing human smuggling. Therefore, the criminalization of human smuggling of each researched country is examined in relation to national specificities in the common EU-European aim to combat illegalized migration and its facilitation. Considering the Europeanization of migration and border politics, it is argued that the foundation of the Schengen area with the emergence of the internal and external borders caused different border situations and "border spaces" (Klepp, 2011). As most migrants and refugees are forced to choose a travel route by sea, Greece and Italy - countries with external sea borders – are faced with the most arrivals on their coasts. Both are considered countries of transit and are, particularly after the financial crisis in 2008, economically under pressure. On the other hand, wealthy countries such as Germany and Austria are geographically positioned in the inner Schengen area, which means that they

are mostly receiving migrants who already managed to transit through other EU-European countries with an external border. Consequently travelling by land means less dangerous paths than by sea. Hence, also the geopolitical positions of the Member States play a central role in developing different EU-European measures to criminalize human smuggling. The project focuses therefore on a detailed analysis of each participating country and will underline the national, discursive-legal developments of the "smuggling" offence and the implementation of international as well as EU-European legal frames. Moreover, we will give an overview of the national political strategies combating "human smuggling." Lastly, the report focuses on the juridical practice by analyzing more than 20 legal cases against presumed smugglers in Greece, Austria, Germany and Italy, asking who is being accused for "smuggling,." which legal measures are being used and how legal frames are interpreted by prosecutors, defenders and judges.

Counter-movements

Our project aims to increase public awareness about the criminalization of escape aid and concrete impacts of national, EU-European, and international border regimes. Next to our researches and analyses, we organized 10 events in Austria, Italy and Germany between 2015 and 2017. These events created an open space for reflection and critical discussions on the criminalization of facilitated border crossings and on the numerous possibilities for forms of resistance and of civil disobedience against restrictive border policies. Our project *Controversies in European migration policies* contributed to the development of a broader transnational resistance movement against the criminalization of escape assistance. Chapter 7 *Controversies in European migration policies – Presented to and discussed with the public* gives therefore, an outline of the events hosted by three of the four participating organizations in chronological order.

The report concludes with a final analysis of our results and formulates recommendations and claims in order to stop this criminalization and speaks out for a free movement of people.

4. THE PROJECT AT A GLANCE: THE PROGRAM *EUROPE FOR CITIZENS* AND THE PARTICIPATING ORGANIZATIONS

The project *Controversies in European migration and border policies – Granting Protection vs. Border Control* was funded by the EU program *Europe for Citizens*. Since the implementation of the Treaty of Lisbon, the program initiated several projects to strengthen a common European civil society. The declared aim of *Europe for Citizens* is to promote an improved understanding of the European Union, its history, and to strengthen the participation of civil society in EU-European debates. In doing so, the program foresees the cooperation of three organizations of three EU Member States. Previous cooperation during both informal and formal projects as well as a common interest in migration questions and human rights brought together the NGOs *borderline-europe* (Germany), *Borderline Sicilia* (Italy), *Asyl in Not* (Austria) and *Diktio* (Greece) with the aim of creating a deeper understanding of the controversies around the "smuggling" business in EU-migration politics. The program, which lasted 18 months, also included the organization of ten events in the participating countries which opened up the discussion to the wider public. As our collaboration with our fourth partner *Diktio* was more of an informal nature, the public events were only hosted in Austria, Germany and Italy. Nonetheless, *Diktio's* participation was crucial for a reflection and comparison about the situation at the EU's external borders in Greece and Italy, in relation to Germany and Austria which both have internal European borders. As activists for migrants' rights and human rights in general, all the project partners were actively involved in the research on the criminalization of escape facilitation. This was done on different levels whether legally by challenging prosecution against alleged smugglers in courts, or po-

litically by promoting a new discourse that focuses on the humanitarian necessity of escape aid under the current EU border regime.

borderline-europe

The non-governmental organization was founded in 2007 in reaction to the increasing problems which migrants encountered with the Dublin II Regulation as well as to the five year trial against the boat captain and committee director of the *Cap Anamur*. During the investigation, the association *borderline-europe* was founded by the two accused and five other activists. The organization understands its work as an act of civil disobedience and fights for the free movement of people and the right to stay. It mainly consists of volunteers who conduct research on the current developments at the EU-European external borders, in the Mediterranean Sea as well as on the Balkan-route. The organization aims to draw public attention to the violation of human rights by the increasingly restrictive EU-European border and migration policies, which compel migrants to use more dangerous routes to reach the EU territory, sometimes with fatal consequences.[7]

Borderline Sicilia

Borderline Sicilia is a non-governmental organization located in Sicily. With its location on one of the EU-European external Schengen borders, Sicily faces a high number of migrants arriving by boat via Libya, Egypt, Tunisia, Turkey and Greece. Therefore, the organization monitors the processes at the harbors directly on the arrival of migrants as well as the practices of the Italian Coast Guard, of *Frontex* and the different Police units. Furthermore, it examines private and state-run practices concerning residence permits, detention centers, and the access to local social services. Through its public relations work, the

7 http://www.borderline-europe.de/wir-ueber-uns. [Last access 06.04.2017]

organization aims to highlight and condemn human rights violations at the EU-European Schengen border. Its aim is to promote the social inclusion of migrants and raise awareness among the local population around topics related to migration.[8]

Asyl in Not

The association *Asyl in Not* solidarizes with refugees whose human rights have been violated and is fighting for the protection of human rights and the right for asylum. The organization understands itself as a political movement. It combines legal assistance, particularly in relation to asylum-seekers whose asylum claims have been rejected, with political activism against a discriminatory and unjust system through research and public relation work. In their political work, they aim to combat "Fortress Europe," as well as institutional and indirect expressions of racism in daily life.[9] The topic of escape aid became central to their work when one member of the NGO was accused of encouraging "human smuggling" practices because of having published an article in which he criticized the criminalization of facilitation to escape.

DIKTIO-Network

The Network of Social Support to Refugees and Migrants (*Diktio*) is an association founded in 1995 in Athens, Greece. *Diktio* is composed of members of different initiatives in defense of the rights of migrants, refugees and ethnic minorities, as well as of members of political, anti-racist and anti-nationalistic organizations and of representatives of migrant communities. *Diktio* aims to enhance the political dimensions of migration and to support the fundamental, social and political rights in general. It offers practical solidarity and support to migrants,

8 http://siciliamigranti.blogspot.co.il/2011/01/borderline-sicilia-onlus.html. [Last access 19.03.2017]

9 http://www.asyl-in-not.org/php/asyl_in_not,11366.html. [Last access 19.03.2017]

encourages self-organization and contributes to the coordination of anti-racist, migrant, social organizations and trade unions. Some of *Diktio's* main initiatives include campaigns for the legalization of undocumented migrants, the organization of numerous political actions and mobilizations for the right to stay, against detention and deportation of migrants, as well as the creation and support of solidarity structures such as the Migrants' Social Centers (see "Steki Metanaston") in different cities.[10]

Ambitions of the project

As border closing processes are proceeded by restrictive migration and asylum laws throughout EU-Europe as well as by the militarization of the borders, we consider the facilitation of illegalized border crossings as a phenomenon of increasing importance. However, only a few studies on the criminalization of "human smuggling" have been published and a limited number of non-governmental organizations are engaged with this topic. In order to fill this gap, the project focuses on developing a data base concerning "human smuggling" by conducting research on the international, EU-European and national discursive, legal backgrounds, which criminalize the facilitation to escape and by collecting, observing and analyzing trial cases on "human smuggling" in the four mentioned country. Eventually, by publishing our researches and by generating new knowledge concerning "human smuggling", we want to create a critical public debate around the criminalization of border crossings and its facilitation.

10 http://migrant.diktio.org. [Last access 06.04.2017]

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2.1. GENERAL OVERVIEW: HISTORICAL AND LEGAL FRAMEWORK FROM THE PERSPECTIVE OF THE UN AND EU SINCE 1990

by Tiziana Calandrino (borderline-europe), Sara Bellezza (borderline-europe)

In the last two decades, public concern with the so-called "irregular" entry of people into the Schengen Area, often used as a synonym for the European Union in public discourse, has been growing. This documentation of *Controversies in European Migration Policies* aims to clarify this issue from various perspectives. As shown in the introductory chapter, activists from four human rights organizations from Austria, Germany, Italy and Greece are working on different levels to demonstrate the discrepancies between the EU's self-declaration as a space of "Freedom, Security and Justice,"[1] on the one hand, and its criminalization of migrants and those facilitating their transport, on the other. In the four countries researched for this report, as well as at the EU level, public and political discourse reflect a growing demand for and increased efforts to prosecute the so-called smugglers of migrants. Represented as bogeyman, the figure of the "human smuggler" is held responsible for the numerous deaths in the Mediterranean Sea[2] and accordingly criminalized for being a threat to (trans)national security and the safety of the people they transport. The process of criminalization is therefore not only legal, but also discursive. Although a clear legal distinction exists between them, smugglers and transport facilita-

1 The so-called "area of freedom, security and justice" was established when the first Schengen agreement (signed by Germany, France and Benelux States in 1985) and the agreement Schengen I from 1990 were integrated into the Treaty of Amsterdam in 1997 (Treaty of Amsterdam 97/C340/01). All EU member states, besides the UK and Ireland, are part of the Schengen area. The treaties of Amsterdam and Tampere in 1999 decided on common EU European migration policies, which lead to the creation of the "external borders" and criminalization of "irregular" aliens as a security threat (Rigo, 2005: 7f.).

2 http://america.aljazeera.com/articles/2014/9/29/migrant-deaths-report.html, http://www.unhcr.org/news/latest/2016/9/57c9549e4/since-alan-kurdi-drowned-mediterranean-deaths-soared.html, http://www.express.co.uk/news/world/730751/Raids-migrant-children-smugglers-arrested-Germany-Austria. [Last access 14.12.2016]. http://www.spiegel.de/panorama/justiz/fluechtlingskatastrophe-18-jahre-haft-fuer-schlepper-a-1125641.html. [Last access 22.12.2016].

tors are often described as human traffickers.

The EU is not alone in dealing with the topic of illegalized migration facilitation and its challenges. In today's globalized world, migration regimes and policies for controlling the movement of people are not unique to any one place, but rather, are imbedded in increasingly global, hierarchical networks and ways of living and moving around the world. International organizations like the United Nations (UN) and its respective agencies and offices, such as the *United Nations Office on Drugs and Crime (UNODC)* and the *United Nations High Commissioner on Refugees (UNHCR)*, are essential players in establishing and implementing international legal frameworks and policies related to migration, including the criminalization of certain aspects thereof. Concern has also been growing at the international level about the smuggling of people beyond nation-state borders and its potential relationship to human trafficking.

This chapter will outline both the differences and commonalities between the legal frameworks for criminalizing smuggling at the international and EU levels. The two most important regulatory frameworks in this regard are the *UN Protocol against the Smuggling of Migrants by Land, Sea and Air [the Smuggling of Migrants Protocol]* and the EU Council's *Facilitators' Package*, both adopted in 2004. Firstly, we will examine the emergence and development of the *Smuggling of Migrants Protocol.* We will then look at how the terms "smuggling" and "trafficking" are used and defined in international law. In order to delimit trafficking from smuggling, it is important to briefly introduce the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*. Both UN protocols are part of the *United Nations Conven-*

tion against Transnational Organized Crime.[3] Next, we will examine the concept of human smuggling in EU law, which uses the term "facilitation of entry" rather than "smuggling." Finally, we will compare the *UN Smuggling of Migrants Protocol* with the EU *Facilitators' Package* to demonstrate how they differ. What means of transport and which facilitators do they criminalize? Do they consider irregular migration as a crime per se or not? Does it make sense to criminalize the facilitation of transport if migration itself is not considered criminal? How do the *UN Smuggling Protocol* and the EU *Facilitators' Package* respect freedom of movement as a human right? Which legal measures has the EU taken in recent years to combat smuggling?

1. *THE SMUGGLIG OF MIGRANTS PROTOCOL*

1.1. EMERGENCE OF THE *SMUGGLING OF MIGRANTS PROTOCOL*

The end of the Cold War in the 1990s heralded an increase in the movement of goods and people on a global scale, also creating new fears and security concerns in the Western world. Western nation-states often viewed the migration movements of people escaping war and conflict zones and looking for better living conditions, as a threat to their national sovereignty and wealth. Under the new paradigm of "migration management," many states began to implement ever more restrictive population mobility controls (Fassin, 2011: 214; Geiger/Pécoud, 2010: 3). The right to freedom of movement was increasingly limited (Rigo, 2005: 11) and more restrictive visa regulations and stricter border controls forced people to look for other, illegalized means of transport. As a result, this also created the need for facilitators of such means. The so-called "smuggling" of persons was first addressed on an international level by the UN General Assembly in 1993 with resolution

3 The United Nations *Convention against Transnational Organized Crime* was adopted by the UN General Assembly in 2000 and consists of three Protocols; two of them the already mentioned Protocols against Smuggling and Trafficking and a third Protocol against the illicit manufacturing and trafficking of firearms. http://www.unodc.org/unodc/en/treaties/CTOC/index.html. [Last access 22.12.2016].

48/102 on the *Prevention of smuggling of aliens*.[4] The resolution called on states to take action for the prevention and combat of any activities that organize the smuggling and transport of "illegal" migrants, "such as the production or distribution of false travel documents, money laundering, systematic extortion and misuse of international commercial aviation and maritime transport, in violation of international standards" (ibid.). This resolution asked states to be wary of not incriminating migrants for being the subject of a smuggling operation. Even though it referred to the rights and dignity of migrants and their vulnerable status as being objects of possible abuse, it made clear that increasing migration in general should be deterred. The resolution did not discuss why migrants are actually forced to travel via "illegal" routes, thereby becoming subject to possible abuse. Instead, in order to prevent the crime of smuggling, the resolution claimed that signatory states should amend their national laws and strengthen transnational cooperation between state-parties (ibid.). It is interesting to note that already, according to the resolution's first draft, migrants should not be liable to criminal prosecution, but rather the people providing their means of transport. It seems rather paradoxical to take into account migrants' rights to travel in theory, while simultaneously criminalizing transport facilitation, necessary for migrants' travel in practice. From 1993 onwards, the question of how to deal with the smuggling of migrants was discussed yearly in various meetings and resolutions of the *UN Commission on Crime Prevention and Criminal Justice (CCPCJ)*, the *UN Economic and Social Council (ECOSOC)*, and the *UN General Assembly* (Schloenhardt, 2015: 28-29). These various UN organs dealt with the topic of migration and smuggling from different perspectives, also depending on which UN Member States would assert their interests in the respective councils and commissions.

In 1997, for example, Italy presented a draft convention to the *Interna-*

4 http://www.un.org/documents/ga/res/48/a48r102.html. [Last access 02.01.2017].

tional Maritime Organization (IMO), with the aim of targeting the smuggling of migrants by sea under international law. The growing number of people from Northern African states and the Balkan region arriving in Italy were one motivation for issuing the draft. Already at that time, the number of people dying in the Mediterranean and Adriatic Sea on their way to Italy was extremely high. In this draft convention, Italy claimed that smuggling practices were responsible for the numerous deaths at sea (Schloenhardt, 2015: 28), and not the fact that people were forced to travel via insecure, illegalized routes. At the same time, the Austrian government made a similar proposal to the UN Secretary General. In the draft called *International Convention against the Smuggling of Illegal Migrants*, Austria put forward a proposal for an international convention to criminalize the smuggling of "illegal" migrants on a transnational level (ibid. 31-32). It further included requirements that contracting states parties would need to change their national legislation to render the smuggling of migrants a punishable offense, and to strengthen the cooperation of states in providing mutual judicial assistance. Subsequently, Italy and Austria agreed to cooperate and included Italy's proposal concerning the smuggling of migrants by sea into Austria's draft for an international convention against the smuggling of migrants.

Most of the UN bodies were pleased with the issuance of the draft for an international convention. At the same time, the *UN General Assembly* was discussing the elaboration of a convention against transnational organized crime in an Ad Hoc Committee. Both efforts led to the establishment of the *Convention against Transnational Organized Crime* in 2000 (European Parliament, 2016a: 23). As mentioned before, this convention was supplemented by the additional *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, and the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, (UNODC, 2004). In 2000, the signing conference in Palermo opened the Convention for signature. It entered into force in 2004 and has thus far

been signed by 116 states parties, as well as ratified by all EU countries except Ireland (ibid.).

1.2. CONTENT OF THE *SMUGGLING OF MIGRANTS PROTOCOL*

The *UN Smuggling Protocol* has three declared aims. Firstly, it provides a legal framework to combat the smuggling of migrants. Secondly, it aims to promote international cooperation, and thirdly, it seeks to protect the rights of migrants (European Parliament, 2016a: 23).

It defines the smuggling of migrants as follows:

> "(a) 'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident; (b) 'Illegal entry' shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State; (c) 'Fraudulent travel or identity document' shall mean any travel or identity document: (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or (iii) That is being used by a person other than the rightful holder; (d) 'Vessel' shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service" (UNODC, 2004: 55).

Moreover, Article 6 of the *UN Smuggling Protocol* also criminalizes the

act of enabling a person to remain in a country of which the person is not a legal resident or citizen in return for a direct or indirect "financial or other material benefit" (UNODC, 2011: 5). In the same article, states are called upon to criminalize such behavior.

However, it is important to highlight that humanitarian assistance to migrants during illegalized border crossings is not subject to criminalization in the Protocol. To help people in danger or to transport family members and friends without any financial benefit, is not considered a crime. Furthermore, the Protocol underlines the importance of protecting migrants' rights and their status as victims of smuggling operations (European Parliament, 2016a: 35). In stating that the transported person, i.e. the migrant, cannot be held responsible for having been subject to an illegalized transport action (UNODC, 2004: 55), the Protocol recognizes that many migrants fail to find legal ways to migrate, even if they are theoretically entitled to do so under the status of people in need of international protection (UNODC, 2011: 51). The *UN Smuggling Protocol* is therefore not in favor of promoting the free movement of people in each instance, but only in specific cases and in accordance with the respective national laws of both transit and destination countries. A paragraph for the return of smuggled migrants is thus also included in the Protocol:

> "Where a person is found not to be in need of international protection, return can only occur in a safe, humane and orderly manner, in which authorities of the countries of origin, transit and destination effectively cooperate to return smuggled migrants with due respect for their rights and safety" (ibid.: 53).

The smuggling of migrants is defined as a crime committed with the consent of the smuggled person, and therefore, is primarily understood as a challenge to the sovereignty of the national borders of the transit and destination countries (Makei, 2013). Hence, smuggling is

not considered to cause any physical or emotional harm to persons *per se*. However, as mentioned before, smuggling is often connected to human trafficking and there have been numerous instances in which smuggling operations have turned into human trafficking, involving harm to the transported person. The exact differences between trafficking and smuggling will be examined in the following section.

1.3. A COMPARISON BETWEEN THE TERMS "TRAFFICKING OF PERSONS" AND "SMUGGLING OF MIGRANTS"

The *United Nations Convention against Transnational Organized Crime* and its supplementary protocols differentiate between the "smuggling of migrants" and the "trafficking of persons." In contrast to the trafficking of persons, the smuggling of persons does not involve, at least from a legal perspective, an element of harm to the transported persons. However, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, defines the trafficking of persons as a crime that directly harms and exploits people. The illegalized transport of a person over transnational borders without their consent also falls under this Protocol. Nevertheless, trafficking is a crime that does not necessarily presume border crossings, as it can also occur inside a state's national borders:

> "'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" (UNODC, 2004: 42).

While trafficking always involves an element of coercion, the same cannot be said about smuggling. Yet, people forced to travel without recognized documents and on illegalized routes can easily become victims of trafficking, as they are often coerced into situations to which they do not consent. While it is sometimes difficult to differentiate between smuggling and trafficking due to the overlapping nature of some routes and the dangerous travel conditions in which the migrants may find themselves (European Parliament, 2016: 22), the distinction between the two concepts is crucial. Such a distinction lays bare the contradiction between, on the one hand, the criminalization of the act of putting people in danger, thus causing physical and emotional harm, and on the other hand, replicating this same criminalization of all means of transport on which migrants depend, thus violating their freedom of movement, which is a human right for everyone.

2. THE EU *FACILITATORS' PACKAGE*

2.1. THE EMERGENCE OF THE *FACILITATORS' PACKAGE*: HISTORICAL AND POLITICAL BACKGROUND

The first time "smuggling," described as an international organized crime involving violence and huge profits, arose on the political agenda of the European Union in the context of the humanitarian crisis and first so-called "refugee crisis" post-World War II that occurred in Central Europe in the 1990s. At that time, the term "smuggling" was used to describe the assistance of illegalized entry into the Member States of the Schengen Area. However, until then, no concrete European policy to combat "human smuggling" had existed (Van Liempt, 2016: 3). This changed with the creation of the "Common Space of Freedom, Justice and Security" within the framework of the Tampere Council and the Contract of Amsterdam in 1999. Since then, the European Union has focused on maintaining a unified migration and asylum policy. One essential element of the policy's ambition was "to tackle at its source illegal immigration, especially by combating those who engage in traf-

ficking in human beings and economic exploitation of migrants."[5] As a result, EU-European officials have attempted to work towards the harmonization and intensification of legal restrictions for "illegal entry" and "human smuggling." A watershed moment, described as one of the reasons for a new EU-European strategy in combating human smuggling, occurred when a high-profile smuggling case came into the public eye in the summer of 2000. Fifty-eight people of Chinese nationality were found dead in a container of tomatoes in the harbor of Dover (United Kingdom). As the migrants had managed to transit through Russia, Ukraine, the Czech Republic, Germany and the Netherlands with the help of escape facilitators, multiple European countries were involved in the case.[6] It was intensively discussed in the European media and described as the first European smuggling case that required common European solutions. The Dover case played a crucial role in the drive to penalize "human smuggling" and was mentioned in most of the policy documents in the early 2000s (Van Liempt, 2016: 3). At the same time that Europe was grappling with the Dover incident, the negotiations for the *UN Protocol against the Smuggling of Migrants* were taking place on an international level, where smuggling was acknowledged as a transnational global problem. As the "Protocol against Human Smuggling" forms part of the *UN Convention against Transnational Organized Crime*, it officially includes the facilitation of transport for migrants within the definition of transnational organized crime (Van Liempt, 2016: 3).

As a reaction to the Dover incident, the French Presidency of the European Council elaborated a legislative proposal for a *Framework Decision on Strengthening the Penal Framework for Preventing the Facilitation of Unauthorised Entry and Residence* (Van Liempt, 2016: 3). One year later,

5 http://www.europarl.europa.eu/summits/tam_en.htm. [Last access 04.01.2017].

6 http://www.deutschlandfunk.de/schreckensfund-im-lkw.871.de.html?dram:article_id=127007. [Last access 04.01.2017].

the European Commission issued a common communication against illegal immigration in which "illegal immigration" was also linked to organized crime networks (Schloenhardt, 2015: 81). The communication explores "the possibility and ways of implementing a comprehensive plan to combat illegal immigration" (ibid.). In 2002, based on the communication paper of the European Commission, the European Union set a *Global Action Plan (6621/1/02) to combat illegal immigration and trafficking in persons*.[7] The Global Action Plan provides a catalogue of "measures" concerning areas such as visa policies, information exchange, readmission and return policies, border management, pre-frontier measures, and penalties. It anticipates enforcement requirements and the harmonization of border controls and visa regulations, as well as the need to strengthen international cooperation, setting out the role of *Europol* in this regard (ibid.).

On 28 November 2002, the Council of Europe adopted the Directive 2002/90/EC "defining the facilitation of unauthorized entry, transit and residence."[8] It was followed by the *Framework Decision* 2002/946/JHA[9] "on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence." The *Council Directive* and the *Framework Decision* form the basis of the so-called *Facilitators' Package*. It is thus specifically aimed at penalizing the pro-

7 As already mentioned in the previous abstract there is a legal distinction between "trafficking" and "smuggling" in international law. This distinction is also reflected in European law. As there is no concrete definition of "smuggling" in European law, the distinction refers to the *Facilitators' Package*. In EU-European law, human trafficking is defined as: "The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation." It is criminalized with the Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims. http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581391/EPRS_BRI(2016)581391_EN.pdf. [Last access 04.01.2017].

8 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:328:0017:0018:EN:PDF. [Last access 04.01.2017].

9 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002F0946. [Last access 04.01.2017].

vision of assistance to undocumented migrants, who are defined as third-country nationals who enter, transit or reside irregularly in the territory of an EU Member State. Each EU Member State was required to implement the Directive into their national legislation within two years. While the aims of the Directive are legally binding for each Member State, the means of implementation vary from Member State to Member State, according to their national legislation.

2.2. THE *FACILITATORS' PACKAGE*

As already mentioned, the *Facilitators' Package* is a combination of the *Council Directive*, which defines the offenses related to "facilitation of unauthorized entry, transit and residence" as criminal acts, and the Council *Framework Decision*, which sets out the penal framework.
The offense of facilitation of illegal entry was mentioned for the first time in Article 27 (1) of the Schengen agreement on 14 July 1985:

> "To impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens" (Schloenhardt, 2015b: 81).

The *Facilitators' Package* replaces Article 27 (1) in the Schengen agreement, instead criminalizing:

> a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens" (Art 1(a) Directive);
> b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned

on the residence of aliens" (Art 1(b) Directive).

As seen in Article 1 of the *Council Directive*, facilitation is defined in two different ways. Firstly, it designates any intentional assistance to a person of a third state entering or transiting a European Member State. Secondly, it refers to the provision of intentional assistance enabling a person to stay in a European Member State without permission and done for the purpose of obtaining financial gain in return (Art 1 Directive, European Parliament 2016a: 25). While Article 27 (1) of the Schengen agreement includes an element of financial gain as an incriminating precondition for the facilitation of "illegal entry", the Facilitator's Directive no longer requires this precondition in cases of "illegal entry." However, it remains relevant for determining facilitation of "illegal stay," according to the Directive.

In cases of humanitarian aid, where assistance to those fleeing is provided free of charge, the *Facilitation Directive* does not offer concrete definitions. Instead, it leaves the regulation of humanitarian aid and assistance to the discretion of the Member States (Schloenhardt, 2015: 94/European Parliament 2016: 27):

> "Any member state may decide not to impose sanctions with regard to the behavior defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behavior is to provide humanitarian assistance to the person concerned" (Art 1 Directive).

Therefore, the *Council Directive* does not make any distinction between various modes of entry facilitation. Be it free of charge in the form of humanitarian aid, or commercial facilitation, or even transnational organized crime, the facilitation of undocumented entry is criminalized *per se*.

Each member state is required to impose sanctions for the criminal offense of "facilitation of illegal entry." The sanctions must be effective, proportionate and dissuasive (Art 3 Directive, Art 1 FD). Even though, the Directive leaves a wide scope of discretion regarding its application and does not give concrete definitions concerning different modes of facilitation, the Council *Framework Decision* foresees stricter sanctions for aggravating circumstances. In these cases, when facilitation is provided for financial gain and/or as part of an activity of a criminal organization that endangers the migrants' lives, Member States must sanction these infringements with a maximum sentence of not less than eight years (Art 1(3) FD). This means that maximum sanctions must be at least eight years, but can go up to an unlimited number of years, as will be seen in the case of Greece.

As previously shown, the *Facilitators' Package* only entails a minimum of criminalization requirements. Neither does it provide a definition for the term "smuggling," nor does it refer to financial gain as a precondition for the crime of facilitation in cases of undocumented entry. Its scope of application is broad and, in contrast to the international legal framework, it does not provide any measures that would allow for the non-criminalization of smuggled migrants in European instruments (Schloenhardt, 2015: 83). These points lead to different concepts, terms and outcomes in international and European law. The main differences are going to be highlighted in the following section.

2.3. TOWARDS A COMPARATIVE ANALYSIS OF THE *SMUGGLING OF MIGRANTS PROTOCOL* AND THE *FACILITATORS' PACKAGE* OF THE EUROPEAN UNION

There are several contradictions in the legal frameworks of the United Nations *Protocol against the Smuggling of Migrants by Land, Air and Sea* and the *Facilitators' Package* (Schloenhardt, 2015b: 5). Although both international and European law try to prevent irregular immigration

(European Parliament 2016a: 23), they differ from each other in regards to elements of financial gain, humanitarian aid and the safeguards for victims of smuggling. However, both legal frameworks correspond to different legal jurisdictions. While the *Protocol against Human Smuggling* was elaborated in the UN *Office of Drugs and Crime* (UNODC), the *Facilitators' Package* is part of the European migration and asylum policy. This leads to different definitions and terminologies when referring to "smuggling." While in the *UN Protocol against the Smuggling of Migrants*, the concept of "smuggling" is clearly defined as organized crime, the *Facilitators' Package* does not mention the term "smuggling" at all. Instead, the term "facilitation" is used to refer to assistance provided to "any person" who tries to enter an EU Member State irregularly and is not a member of a European Member State (European Commission 2015: 71; Schloenhardt 2015b: 6). The aspect of "financial gain" leads to different forms of criminalization of humanitarian assistance. While in the *UN Protocol against the Smuggling of Migrants*, the aspect of financial gain is required for an action to be classified as the crime of smuggling, it also explicitly excludes humanitarian aid that enables the entry and transit of migrants in cases of emergency, from being a crime. Moreover, it specifies that help provided by non-governmental groups or family members to persons crossing borders without appropriate documents, is not considered a crime. To the contrary, the *Facilitation Directive* does not give concrete definitions concerning humanitarian aid and leaves it to the discretion of the EU Member States. The *UN Protocol against the Smuggling of Migrants* explicitly prohibits the criminalization of migrants for being the object of smuggling as defined in Article 5. However, neither the *Council Directive* nor the *Framework Decision* entails an extra clause specifying that the Member States should not criminalize the smuggled migrants for being the object of the offense. The European instruments only refer to the principle of *non-refoulement*, as articulated in the 1951 *Convention Relating to the Status of Refugees* and its 1967 Protocol. According to the latter, every persecuted refugee has a right to international protection, and is exempted

from the criminalization of illegal entry and of the facilitation of illegal entry. Whereas the EU-European law considers the principle of only in the offense of illegal entry, it does not, according to Article 6 of the *Framework Decision*, exclude the facilitation of any entry from punishment. Yet, it is also important to mention that the preamble of the *Council Directive* and the *Framework Decision* highlight the aim of combating "illegal immigration" and the "aiding of illegal immigration." According to this statement, the humanitarian aid provided to asylum seekers and refugees could be criminalized, however, this point remains blurry in the *Facilitators' Package* (Schloenhardt, 2015: 95). Therefore, the *Facilitators' Package* provides neither a mandate nor a justification for the criminalization of the migrants having been smuggled (ibid. 2015: 97).

Concerning the aspects of financial gain, humanitarian aid and non-criminalization of smuggled persons, the *Facilitators' Package* tries to cover two contradictory claims. On the one hand, it is obliged to consider international standards that emphasize human rights as well as the right of all migrants to international protection. On the other hand, the *Facilitators' Package* was implemented to combat undocumented migration and to criminalize any facilitation of undocumented entry. In doing so, it limits the ways for legal entrance and therefore, acts contradictory to the human rights of migrants, including their right to international protection. To avoid explicitly acting against international human rights standards, the criteria of financial gain, humanitarian aid and safeguards for smuggled persons are expressed only vaguely, providing the EU Member States with wide discretion.

According to the 2015 *EU Action Plan against Migrant Smuggling*, the European Commission is trying to improve the *Facilitators' Package*, including strengthening the penalties for smuggling and defining it as a form of organized crime without criminalizing humanitarian help and the rescue of migrants in distress (European Commission, 2015: 72). However, until now, no such developments can be clearly identified.

As this comparative analysis demonstrates, international and European laws differ from each other, leaving us with vague definitions concerning the penalization and criminalization of the smuggling of migrants. European law, in particular, leaves a wide margin of discretionary space in which Member States, through their national legislation, may interpret the elements of financial gain, humanitarian aid and safeguards for smuggled persons. Therefore, the criminalization of human smuggling differs in the legal frameworks of the various European member states. Hence, an analysis of the actual legal practices involved in the criminalization of entry facilitation in different EU Member States is necessary, and will be provided in detail in the four country reports on Greece, Italy, Austria and Germany.

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2.2. GERNERAL OVERVIEW: THE EMERGENCE OF THE LEGAL TROPE OF "SMUGGLING" AND ITS CONSEQUENCES

by Tiziana Calandrino (borderline-europe)

This chapter discusses the development of the legal trope of "smuggling" in international as well as EU-European legal frameworks, concentrating on how this legal concept was progressively instrumentalized to combat illegalized migration in the years preceding the 2015 "refugee crisis."

To accomplish its aims, this chapter presents five case studies taken from the four countries examined in this report: Germany, Austria, Italy and Greece. The cases demonstrate the criminalization of people who have facilitated the illegalized entry of other people for humanitarian reasons. In contrast to the dominant "smuggling" discourse, these examples demonstrate that the facilitators in question, or "smugglers," were not acting in the context of transnational criminal networks, as their criminalization under existing legislation implies. For Germany, the case relates to a Syrian engineer, who was presented as the "head of a smuggling ring" in public media discourse for his role in helping people fleeing the war in Syria to cross the German border. In Austria, the case presented involves eight people, some of whom are activists with the group *Refugee Protest Vienna*, who were sentenced for "smuggling" because they advised friends on how to choose a destination country in Europe. The Austrian case also shows how the legal concept of "smuggling" enables the criminalization of political activist groups involved in the border-crossing movements. Italy and Greece are located in a special "border space" (Klepp, 2011), as their geographical position at the external sea borders of the EU leads to their direct involvement with people who are trying to cross the Mediterranean Sea by boat and subsequently get into distress. In Italy in 2004, three members of the non-governmental organization (NGO) *Cap Anamur*, and in 2007, seven Tunisian fishermen, got arrested for saving migrants in

distress in the Mediterranean Sea. These cases reflect how sea rescues were turned into cases of "smuggling" by the Italian authorities. Lastly, for Greece, the *Farmakonisi* case presents an example and analysis of how a state-run illegal push-back can be framed as a case of "smuggling."

All of the case studies reflect the political aim of the EU Member States to combat "illegal migration" by using the legal "smuggling" trope. At the same time, the infringement on human rights by state-run authorities in each case led to public controversies at a national and international level. On the one hand, media reports reproduced a morally loaded, dominant political narrative of "smuggling," connecting it to human trafficking and organized crime. On the other hand, public criticism arose and questioned the treatment of the actors involved. Consequently, the cases discussed in this section are considered in relation to controversies surrounding how they were presented in public discourse, what really happened according to the people involved, and how these different actors participated in creating precedent cases.

1. GERMANY – THE CASE HANNA L.

On 29 January 2013, the German Federal Police Force issued a press release stating that an operation against an international smuggling ring had succeeded. On a large-scale search in three German Federal States, the German Federal Police Force entered 37 different apartments, obtained 11 arrest warrants, and found important incriminating evidence.[1] This was reported in articles of several local newspapers with headlines like "the smuggling group facilitated the illegal entry of 270 Syrian citizens in 127 cases." According to the articles, the head

1 https://www.ikz-online.de/staedte/essen/schlag-gegen-internationale-schleuser-mutmasslicher-bandenkopf-wohnt-in-essen-id7535925.html

of the group was a 58-year-old engineer living in Essen.[2] Media reports framed this "smuggling" case as one of the biggest in ten years to reach public attention and to be solved by the German security apparatus. The polemic following this incident raised the interest of the journalist Stefan Buchen. He traced the details of the case and started intensive research to find out who the people were and what their motives were for involvement in the so-called "smuggling ring." Based on bills of indictment, protocols of legal proceedings, and verdicts concerning the case, Buchen published his results in the book *The New State Enemies: How the helpers of Syrian war refugees are being criminalized* (2014) (In German: *Die neuen Staatsfeinde. Wie die Helfer syrischer Kriegsflüchtlinge in Deutschland kriminalisiert werden*).[3]

Background

The criminal proceedings in the case of Hanna L. began in autumn 2011, when the German Federal Police Force apprehended a lorry with 14 migrants of Syrian nationality close to the city of Forst, at the German-Polish border. After several hearings and the checking of the migrants' mobile phones, the police officers found that the migrants had been calling the German phone number of Hanna L.

After Hanna L. had been connected to the migrants in this way, he became suspected of organizing the illegal entry of Syrian nationals into German territory. The German Federal Police Force started a new investigation procedure focusing on Hanna L. and created the file name "Cash." In December 2011, the German Federal Police Force requested the observation of Hanna L., which was granted by the prosecutor in

2 http://www.derwesten.de/panorama/grossrazzia-gegen-schleuser-auch-in-nrw-id7538320.html. [Last access, 14.02.2017]. https://www.derwesten.de/staedte/essen/ingenieur-aus-essen-soll-kopf-einer-schleuserbande-sein-id7612022.html. [Last access, 14.02.2017].

3 The following information about the case Hanna L. is taken from the book "The new state enemies. How the helpers of Syrian war are being criminalized." Stefan Buchen, 2014.

Essen. From this moment on, all phone calls of Hanna L. were intercepted and he was physically observed for 15 months. On 29 January 2013, Hanna L. was arrested in his house in Essen on the grounds of being the head of an internationally- operating smuggling ring. Together with five "accomplices" from France and other cities close to Essen, he was put in detention. Hanna L. met his alleged accomplices for the first time in detention, where he spent 81 days before being released on bail for 20,000 Euro.

Hanna L., a well-situated engineer living in Essen with his family, is originally from Al-Malikiya, a city in the north-east of Syria. He moved to Germany to graduate from university in his early twenties and has now been living in Germany for over 30 years. He has both German and Syrian citizenship.

Before the war started in Syria, it was common practice in the Syrian exile community to bring money or other goods to family and friends in need in Syria. People would sometimes travel to Syria for this purpose with amounts as high as 20,000 Euros. However, since the war began in Syria, this means of transferring money was shut down, as the European Union imposed an economic embargo on Syria. As medicine, groceries and other resources became limited goods during wartime, the demand for financial support from family members living in exile became even more important. Together with his brother Raid, who owns a jewelry and gold shop back in al-Malikiya, Hanna L. started using a traditional form of money transfer to send money from Germany to Syria. The *Hawala banking system* has been notorious in Europe since 9/11, when it was used for money-transfers financing Al-Qa'ida. The system enables money transfers without a formal bank through the use of intermediaries, and is therefore an invisible and anonymous way to transfer money internationally. Accordingly, any transaction made with the *Hawala* banking system is automatically associated with international organized crime and terrorism. The trans-

actions made by Hanna L. had multiple purposes, amongst which were to pay for facilitating the entry of friends and relatives into Germany. The money-transfer system relies on the trust of the partners involved and, therefore, people would approach Hanna L. to ask him if he could transfer money from Germany to Syria on their behalf. After receiving the money, he would contact his brother, who would then pay the people who were offering a service. For money transfers concerning the facilitation of migration, Hanna L. would only release the money to his brother once the facilitation succeeded. For each transaction, Hanna L. and his brother charged a fee of three to five percent. This fact transformed Hanna L. into the financial head of an international smuggling ring.

At Court

The hearing at the court of Essen took place in October 2013. Along with Hanna L., a young man living in Athens, Hame, was also accused of having facilitated the illegalized entry of Syrians from Greece to Germany. As he was in contact with Hanna L., he had also been observed for half a year. Soufian S. and Hussein E., two taxi drivers who drove Syrian citizens from Paris to Germany in their taxis, as well as Sagher H. and the Syrian refugee Jaber Merji, were also accused.

All together, they were accused in 128 cases for commercial and organized smuggling with the aggravating circumstance of endangering the migrants' lives during the smuggling operations.

Hanna L.'s defense lawyer applied to strike out the proceedings, as all of the "smuggled" individuals had either successfully gained refugee status or were currently in the process of seeking asylum. Hence, following Article 31, *Convention and Protocol relating to the Status of Refu-*

gees[4], the offense of "illegal entry" should have been dropped from the criminal charge. With this argumentation, the defense tried to question the general existence of the offense of "illegal entry" for Syrian refugees, as they were obviously fleeing war and persecution. However, the judges and prosecution rejected the request. Instead, the judge found the accused men guilty and offered, in an informal conversation with the prosecutor and the defense, a penalty of around three years' imprisonment for each of the accused. While during the hearings, the accusation of endangering the migrants' lives during the smuggling actions had been found to be true, the migrants who had managed to enter Germany with the help of the accused men testified to having arrived safely without experiencing any violence. According to the statements in their testimonies, the accusation was thus unfounded and had to be dropped. The same applied for the accusation of organized smuggling, which was hence replaced with the wording "a similar structured" group (Buchen, 2014: 174-175). What was left was the offense of repeated action for the benefit of several foreigners and commercial facilitation. Hame had earned 300 Euro per person through his role, which was handled as if he had drastically enriched himself through this work. The element of financial gain was exaggerated during the hearings and was the main incriminating fact that led to increased penalties for each of them. Eventually, all of the accused men were sentenced: Hanna L. received two years on probation and a fine of 110,000 Euro; Hame and Jaber Merji got three years' imprisonment; Hussein E., the taxi driver, received two years and ten months' imprisonment; and Sagher H. got nine months on probation.

1.1. CREATING NEW SUBJECTIVITIES

In Germany, the emergence of and justification for the legal trope of

4 http://www.unhcr.de/fileadmin/unhcr_data/pdfs/allgemein/GFK_Pocket_final.pdf. [Last access, 09.04.2017].

"smuggling" is based on a dominant discourse about "smuggling" that connects the phenomenon to human trafficking and transnational organized crime. To fight "human smuggling," Germany has developed a large-scale security apparatus that is also in charge of combatting transnational organized crime, such as trafficking, the drug trade, and terrorism. The security apparatus activates an investigation process, for example, to follow suspected persons like Hanna L. However, the institutions involved in this apparatus, such as the Federal Police Force, the Federal Intelligence Service, and *Europol,* instantly consider the suspected person to be the "head of a transnational organized crime group," and hence, follow the working operations used for combating transnational organized crime. In turn, officials of the institutions involved treat suspected persons like Hanna L. as "an object of information" (Feldman, 2011: 6) because their declared aim is to gather information about Hanna L. and on whether there might be connections to a transnational organized crime network. Consequently, the more securitization-based investigations that are made, the more helpers of Syrian war refugees become transformed into transnational organized criminals. The Hanna L. case demonstrates this mechanism very clearly, as the state-run machinery against terrorism and organized crime observed him, a man who was helping Syrian war refugees flee, for 15 months and eventually transformed him into a transnational organized criminal, or even a terrorist. As these investigation processes are legally justified and have therefore become normalized practice, media reports rarely bother to critically examine investigations concerning "smuggling." In doing so, they reproduce a predominant political discourse about smuggling as transnational organized crime. To sum up, a predominant discourse about the negative connotations of "smuggling" is used to form the basis for a legal frame concerning "smuggling." The case of Hanna L. shows how the legal category of "smuggling" is used by enforcement agencies in an indiscriminate manner against people who facilitate entry into the German territory, including those who help others flee from persecution or serious harm.

The framing of facilitation of illegalized movement as a crime is reinforced by a dominant media discourse that reports on smuggling cases in an uncritical manner. Instead of questioning state narratives, most reports reproduce negative images of the accused as criminals. Thus, the public discourse on smuggling in Germany and the political strategies of the security apparatus are strongly intertwined.

2. AUSTRIA - THE CRIMINALIZATION OF EIGHT PARTICIPANTS OF THE *REFUGEE PROTEST VIENNA*

Although the topic of human smuggling has been present in Austrian media for some decades (see Hausjell, 2016), public interest increased in 2013 during the arrest and trial of eight refugees from Pakistan, Afghanistan and India who partly participated in the *Refugee Protest Vienna*.[5] They were taken into investigative custody and were accused of commercial human smuggling as part of a criminal organization. The trial lasted 43 days and it is one of several prosecutions of political movements in Austria over the last few years.[6] During the trial, public criticism arose that focused on several specific points: *Quality of translation*: Translators added their own interpretation into their translation of the telephone surveillance protocols from Urdu and Panjabi into German, disfavoring the accused. In the protocols, words like "schleppunwillig" (reluctant to being smuggled), which had not been part of the actual phone conversations, were added. In 2016, an investigation for suspected fraud against one of the translators was opened.[7] *Deficits in the indictment*: The prosecutor's indictment was principally based on these telephone surveillance protocols, in which the persons speaking were only partly identifiable and therefore, some classifications (voice-person) remained incomprehensible.

5 https://refugeecampvienna.noblogs.org/

6 Trial against animal rights activists, Operation Spring.

7 http://derstandard.at/2000046293041/Wien-Polizeidolmetscherin-steht-unter-Betrugsverdacht. [Last access 14.11.2016].

The judge partly recognized the above-mentioned points of critique. She stopped one trial after the fifth trial day and discontinued proceedings for six weeks in order to review two contradictory police reports on which the accusation was built. Thus, the court released the accused refugees from investigative custody for six to eight months.
Thanks to public pressure and media attention, the state council modified the charges, merging some of the specifications respectively to weaken some of the accusations. What had been the indictment of "facilitation of illegal entry to Austria with financial remuneration" became the allegation of "facilitation of the entry to/via Austria to another country."

In this trial, the accused smugglers were themselves refugees. In their public testimonies, they explained the humanitarian motivation behind their engagement in the facilitation of cross-border movements. By clarifying that they had helped friends from their countries of origin to choose a destination country, the accused stressed that different EU Member States can be distinguished by the rate of positive asylum claims. Thus, they gave reasons why many refugees cross Austria to move on to countries like Germany or Italy, as they can find higher chances for positive asylum or family reunification procedures (ibid.).
In December 2014, seven of the eight accused were found guilty; the degree of penalty was between seven and 22 months' imprisonment. Without probation, all of their sentences matched exactly with the time they had already spent in investigative custody. Due to appeals and declarations of nullity, the verdicts have not yet come into effect.

2.1. SIDE EFFECTS OF CRIMINALIZING HUMAN SMUGGLING

The case of the accused refugees in Wiener Neustadt showed that with the criminalization of "human smuggling," one major side effect is emerging: people who once fled to the European Union themselves often know about travel routes, visa requirements and asylum proceed-

ings. Additionally, they might have friends or family members who are willing and/or forced to cross borders. Thus, very often, migrants get involved in facilitating border crossings, as they want to help their friends or family members. The criminalization of so-called "smuggling" therefore enables the criminalization of migrants themselves, for possessing the knowledge and experiences of being migrants, and often leads to structural racism. This was also seen in the case of Hanna L. in Germany. The "smuggling" paragraph also enables the criminalization of political movements and support groups engaged in the fight for the free movement of all people.

3. ITALY – TUNESIAN FISCHERMAN AND *CAP ANAMUR*

3.1. *CAP ANAMUR*

The Rescue

In June 2004, the auxiliary vessel *Cap Anamur II* of the NGO *Cap Anamur*, carried out a test drive on the Mediterranean Sea in order to check whether the vessel was functioning properly. On 20 June, the crew apprehended a rubber boat in distress 100 nautical miles south of the coast of Lampedusa and 180 nautical miles away from Malta (Jakob, 2014). The rubber boat was carrying 37 migrants, mostly from African states, who were trying to cross the Mediterranean Sea to reach EU-Europe. The crew rescued the 37 men by taking them aboard the *Cap Anamur* II. Eight days later, Elias Bierdel, the head of the NGO *Cap Anamur*, joined the vessel from Tunisia and headed towards Lampedusa. As the harbor was too small for the big vessel, it changed course towards Sicily. On 1 July, the captain Stefan Schmidt received permission to enter the harbor of Empedocles (Sicily), however, the Italian authorities denied them entry for unknown reasons right before the entrance. Fifteen minutes later, the *Cap Anamur II* was surrounded by Italian military vessels, the Italian Coast Guard and the Italian Police, which blocked the boat's access to Italian territory. Meanwhile, neither the Italian nor

the Maltese authorities felt responsible for letting the vessel enter the harbor. After another five days spent at sea, the captain of the *Cap Anamur II* received the official reason for the denial of entry: the rescued migrants had lost their status of protection, as they had remained on the vessel for too long after the rescue.

The refusal of entry reached public attention, as newspapers publicized the incident, resulting in solidarity actions by Italian NGOs, *UNHCR*, and parliamentarians who were trying to convince the Italian authorities to let the *Cap Anamur II* enter. On 11 July, 37 applications for asylum were handed over to the Italian Council for Refugees (Consiglio Italiano Per I Rifugiati – CIR). At this time, the *Cap Anamur II* had already been stuck at sea for eleven days. The atmosphere on deck became tense; one migrant tried to jump off the boat, while two others passed out and needed medical treatment. Captain Stefan Schmidt had to claim a case of emergency and called on the Italian authorities to permit entry into the harbor of Empedocles (Sicily). On the following day, 12 July, entry was permitted. After arrival, captain Stefan Schmidt, Elias Bierdel and the vessel's first officer Vladimir Daschkewitch were arrested for the "assistance of illegal entry."

After many protests and interventions by solidarity groups, activists, and NGOs, the three crew members were released on 16 July 2004. Despite their release, criminal proceedings against them continued (Klepp, 2011, 271). Twenty-two of the 37 asylum applicants were brought into custody prior to deportation in Caltanissetta. The 15 others were brought to detention centers in other parts of Italy. Eventually, all of them were deported.

At Court

In November 2006, the hearings for the crew members began at the court of Agrigento. The prosecution demanded a sentence of four

years' imprisonment and a fine of 400,000 Euro for each of the accused. According to Article 110 and Article 12 I°, III°, III° of Italy's Migration Law, they were accused for the "assistance of illegal entry" with having gained a direct or indirect profit, and with the aggravating circumstance of having acted as an organized criminal group. Moreover, they were accused of having pretended that there was an emergency situation on board in order to enable the "clandestine" entry of 37 people into Italian territory (Borderline Sicilia, 2016).

After three years of negotiations on trial, Stefan Schmidt, Vlademir Dachkevitch and Elias Bierdel were eventually acquitted on 7 October 2009.

The role of the state authorities

The Italian Ministry of the Interior played a crucial role in the *Cap Anamur* case, as it was in charge for all decisions concerning the proceedings. On the one hand, it tried to hide important facts concerning the sea rescue and tried to lay blame on the crew members of the *Cap Anamur II*, as well as on the 37 migrants trying to apply for asylum. According to a journalist, the Italian Ministry of the Interior gave the wrong information concerning the refusal of entry at sea: it denied that there was a denial of entry at all and claimed that the *Cap Anamur II* rescued the migrants close to Malta, after which it was already on its way to Spain. The *Cap Anamur* crew reacted to the misinformation by inviting journalists on the *Cap Anamur II* to enable them to clarify the situation. At this point, the case of *Cap Anamur II* had reached public attention and made a political impact, as newspapers published articles with pictures of vessels blocking the *Cap Anamur II* entitled: "The government is lying" (Klepp, 2011: 269). The German, Italian and Maltese governments began to engage with the case, but no one felt responsible for it. On 6 July 2004, the Minister of the Interior of Germany Otto Schily, and the Minister of the Interior of Italy Giuseppe Pisanu,

commented on the *Cap Anamur* case during the Ministry Conference of the European Union. Both agreed that, according to international maritime law, Malta was the state in charge, as the rescue happened in a Maltese operation area. The ministers warned that diverging from international maritime regulations would create a dangerous precedent that would open possibilities for misuse, and encouraged proceedings to be brought against the *Cap Anamur II* crew.[8] Concerning the asylum proceedings for the 37 rescued persons, the Italian Ministry of the Interior showed a zero tolerance policy and supported the deportation of all the rescued migrants. At first, the applications for asylum from the *Cap Anamur II* were rejected. However, because of public pressure and the criticism of the *UNHCR*, the 22 migrants who were brought to a detention center in Caltanissetta, were able to apply for asylum a second time. The Central Commission in Rome decided to grant all of them humanitarian protection. During these days, several ambassadors of different African countries came to visit in order to clarify the migrants' identity. The Nigerian and Ghanaian ambassadors declared the 22 migrants to be of Nigerian and Ghanaian nationality, which led to their deportation to these countries. The originally-declared humanitarian protection for the 22 migrants was revoked with the official reason that the migrants had lied when referring to their countries of origin. While members of the Nigerian and Ghanaian embassy immediately got access to the inmates, their lawyers were not permitted access. With the deportation of the 22 migrants, the Italian government violated both international and EU-European law, as the migrants did not receive a correct asylum procedure, and as the recognition of the migrants' identity was only based on statements of the ambassadors without further investigation. The European Court for Human Rights intervened immediately and requested explanations for the deportation, unfortunately without success, as it was ignored by the Italian government (Klepp, 2011: 272-274).

8 http://www.deutschlandfunk.de/bierdel-prozess-dokumentiert-den-groessten.694.de.html?dram:article_id=67205. [Last access, 08.03.2017].

In August 2007, seven Tunisian fishermen were arrested for assisting "illegal entry" to Italy after rescuing 44 migrants on a rubber boat in distress. The case was heard in the court of Agrigento (Sicily).

Rescue

On 8 August 2007, a crew of seven Tunisian fishermen apprehended a rubber boat with 44 passengers, 35 nautical miles in front of Lampedusa. One of the two captains of the crew, Abdelbassete Jenzeri, contacted the Tunisian public authorities and all other authorities in charge to ask for help, as required by international maritime law. The Italian authorities replied to the request and told the fishermen that they were going to send help immediately, however, they told the fishermen not to do anything concerning the rescue. As the weather conditions worsened and there were two sick children and a pregnant woman on the rubber boat, the fishermen acted instantly and took all 44 migrants on board their three fishing boats. After one and a half hours, the Italian Coast Guard sent three boats and demanded that the Tunisian fishermen follow them to the closest port at Lampedusa.

Arrest on Lampedusa

After the rescue, the three fishing boats tried to enter the port of Lampedusa, but were hindered by Italian military vessels. After a while, the fishing boats managed to enter the port. The injured people were taken to hospitals by helicopter and the seven fishermen were arrested. They were accused of "facilitating the illegal entry of migrants" with the aggravating circumstance of gaining profit, according to Italy's Migration Law §12. After spending 32 days in detention, five of the fishermen were released, while the two captains were only released after 45 days. The three fishing boats were confiscated. Public criticism

rose in reaction to the treatment of the Tunisian fishermen and resulted in a petition to the European Parliament, where 111 Parliamentarians signed for the relief of the two captains (Jakob 2011: 36, Bildungswerk Berlin der Heinrich Böll Stiftung, 2012: 11). After 45 days in detentions, the captains were eventually released. However, the three fishing boats were still confiscated.

At Court

In 2007, the court in Agrigento initiated an expedited procedure in which the seven fishermen were accused of assisting illegal entry with the aggravating circumstance of gaining profit. At the beginning of the proceedings, the prosecution dropped the aggravating circumstance of gaining profit (Klepp, 2011: 280). Nonetheless, the prosecutor demanded a sentence of two and a half years' imprisonment and a fine of 440,000 Euro (10,000 Euro for each saved migrant).

The defense lawyers, Leonardo Marino and Giacomo La Russa, brought several messages and faxes from the fishermen to the Tunisian authorities, as well as Maltese and Italian officers in charge, proving that there had been an attempt to request help in accordance with international maritime law before their arrival at Lampedusa. According to that and several additional hearing files, it became clear that the Tunisian authorities had sent a fax to Rome and Malta notifying them that the three fishing boats had rescued 44 passengers from a rubber boat in distress, and informing them that there were several people in bad health conditions. In this fax, the Tunisian authorities had requested adequate measures. During the proceedings, it also became clear that the authorities in Rome instructed the units in Palermo and Lampedusa to take care of the situation. De facto, this means that, legally, Italy was in charge of the rescue procedure.

During the first trial, the missing fishing nets on the fishing boats were

taken as incriminating proof of the fishermen being smugglers. However, after explaining the special fishing techniques of the Tunisian fishermen, this accusation was dropped.

Nevertheless, in May 2008, the prosecution added several other charges to the indictment, including disobedience towards the command of state authorities by entering Italian waters without permission and resistance against a naval vessel. Additionally, the captain, Abedelbassette Jeneri, was accused of having threatened to kick the migrants off the boat, which was used to justify why the Italian coast guard boat had been forced to do several evasion maneuvers.

According to the Corte di Cassazione (the highest instance court in Italy), it is not allowed to add points of accusation after the first hearing, and without a change in evidence. The prosecution could hence be considered as having harmed the legitimate rights to defense of the accused, which the defense lawyers tried to leverage on behalf of the fishermen. This argument was initially unsuccessful. However, after rescheduling the following hearing days several times, the court in Agrigento acquitted the two captains and five crew members of the charges of assisting illegal entry and resistance against Italian authorities. Moreover, the court declared the five crew members not guilty of the offense of acting against state authority and acting against a military vessel. However, the captains Jenzeri and Bayoudh were sentenced to two years and six months' imprisonment, as well as the cost of the proceeding, for the crime of acting against naval vessels. Their defending lawyer appealed immediately against the verdict, based on the subsequently added points of accusation (Bildungswerk Berlin der Heinrich Böll Stiftung, 2012: 7-11).

The arrest of the seven fishermen caused bilateral tensions between Italy and Tunisia, as the Tunisian government confirmed that the fishermen were honorable fishermen and not so-called "smugglers," as the

Italian government claimed (Klepp, 2011: 279). The case was accompanied by international solidarity demonstrations and public criticism. The Tunisian fishing commissary from Port Teboulba and several human rights NGOs were convinced that the Italian authorities created a precedent case, in order to keep foreign fishing boats out of Italian maritime territory.

3.3. TURNING SEA RESCUE INTO CASES OF "SMUGGLING"

Both incidents show an obvious abuse of the legal trope of "smuggling" by the Italian authorities, used to criminalize sea rescues with the smuggling paragraph. Before analyzing the reasons for these political decisions, which caused international and national criticism, it is important to describe the special situation of the EU external sea border. The sea border creates a special "border space" (Klepp, 2011) as a space of legal pluralism: international maritime law, which foresees the need of humanitarian aid to boats in distress by both nation-state-run services and private persons, works in concert with international migration law, including the *Geneva Convention*, which provides for humanitarian aid and the protection of refugees, as well EU-European and member states' national migration laws, which try to control and reject "illegal migration."

The presence of migrants trying to reach Schengen-Europe leads to a collision of these different legal regimes when private actors, such as the Tunisian fishermen or the humanitarian organization *Cap Anamur*, try to rescue boats in distress. This collision is ultimately a consequence of the contradictory logic of the EU-border- and migration regime, which seeks both to reject unwanted illegalized migration and to adhere to international human rights and humanitarian agreements that require the protection of refugees.

From a nation-state perspective, the control of migrants' boats in dis-

tress should be at the discretion of individual states, in order to maintain their sovereignty. This is why the Italian authorities had a zero tolerance policy in both the *Cap Anamur* and the Tunisian fishermen cases. Through harsh criminalization, the Italian authorities were also aiming to deter further humanitarian assistance by confusing fishing boats and NGOs regarding which law is active and takes precedence in rescue situations: international maritime law, which obliges crew members to rescue people in distress, or EU and national migration law, which potentially criminalizes rescuers for "human smuggling." In both the *Cap Anamur* and Tunisian fishermen cases, the legal concept of "smuggling" served to criminalize the rescuers and was used as a dissuasive measure to keep actors other than state-run institutions away from migrant vessels. The willingness of the Italian authorities to infringe international legal obligations, including human rights obligations, in the face of public criticism, shows the state's strong aim to combat "illegal migration" (Klepp, 2011: 282-283). Eventually, both incidents showed ad-hoc political reactions caused by the pressure of illegalized migration on governance, as well as its unintended side effects.

4. GREECE – THE CASE OF *FARMAKONISI*

Background

During the night of 20 January 2014, a 10m fishing boat carrying 28 refugees from Afghanistan (25) and Syria (3) sank near the coast of the islet of *Farmakonisi*, in the southeast Aegean Sea (Dodecanese). The shipwreck resulted in the death of 11 persons - 3 women and 8 children.

According to media reports,[9] based on information given by the Greek

9 "Bodies of boy, 11, woman, 38, located off Turkish coast after *Farmakonisi* capsize." Kathimerini. N.p., 22.04.2014. http://www.ekathimerini.com/157189/article/ekathimerini/news/bodies-of-boy-11-woman-38-located-off-turkish-coast-after-farmakonisi-capsize. [Last access, 27.01.2017].

Coast Guard, the accident occurred during a rescue operation, while the coast guard vessel was towing the small boat towards *Farmakonisi*. The boat, according to the official statement (Hellenic Coast Guard, 2014), capsized and sank when two of the passengers fell into the sea and the others reacted by moving to one side of the boat. On Tuesday, 22 January, a team from *UNHCR*, led by the head of the Greek office Mr. Tsarmpopoulos, went to the island of Leros where the pre-trial investigation was being conducted by the port authorities. *UNHCR*, after contacting the survivors held in custody and the competent port authorities, released a statement referring to considerable contradictions between the statements of the survivors, taken by *UNHCR*, and the official claims of the coast guard authorities, as well as the testimonies taken during the investigation procedure. Laurens Jolles, Regional Representative of the High Commissioner for Southern Europe, stated that *UNHCR* "urges the authorities to investigate the circumstances under which the incident occurred, and how lives were lost in a boat under tow" (*UNHCR*, n.d.). After their release, the survivors of the *Farmakonisi* tragedy, supported by human rights and anti-racist organizations, spoke to the press at the port of Piraeus and gave a press conference outside the Greek Parliament on 25 January. They repeated their claims that their boat had nearly approached the Greek coastline without being in distress, when it encountered the coast guard vessel. The coast guard officers towed the boat, driving it at high speeds towards Turkey under bad weather conditions. They blamed the officers for causing the accident and reported acts of mistreatment and denial of help. At the same time, they disputed the testimonies taken by the port authorities at Leros – which had already been leaked to the media – for not being conducted with an interpreter that spoke their native languages, nor in a language that they understood.[10] The case immediately attracted domestic and international media attention and

10 "Reports from press conference by survivors of *Farmakonisi*". Greek Forum of Refugees, 27.01.2014. http://refugeegr.blogspot.gr/2014/01/reports-from-press-conference-by.html. [Last access, 27.01.2017].

sparked political controversies at the national and international level. Among the interventions carried out by the European Commission, the EU Parliament, Amnesty International and other human rights NGOs,[11] a serious political confrontation arose between Greece's Minister of Shipping, Maritime Affairs and the Aegean Miltiadis Varvitsiotis, who serves as the political supervisor of the Hellenic Coast Guard, and the Commissioner for Human Rights of the Council of Europe, Nils Muižnieks (Commissioner for Human Rights, 2014). Defending the actions of the Coast Guard, Mr. Varvitsiotis stated in Greek media that "Muižnieks and various others want to cause a political issue in Greece." He claimed that there was indisputable evidence of the geographical position and the course of the vessels, and referred to the alleged change in the testimonies of the survivors as "striking and curious." Nevertheless, he insisted that a judicial inquiry would be held and he addressed a letter to Muižnieks stating that the government "immediately ordered the competent judicial authorities to investigate the circumstances of the incident and the conditions of rescue," adding that "the competent District Attorney has pressed charges only to the master of the boat that was carrying the illegal immigrants" (ibid.). At the end of July 2014, the prosecutor of Piraeus' Marine Court decided to close and archive the investigation concerning the alleged responsibilities of the coast guard officers for the shipwreck, as "manifestly ill-founded in substance."[12] This development resulted in the case of *Farmakonisi* being subject to judicial investigation only in respect to the offense of "illegal entry." One year after the shipwreck, a 21-year-old

11 "EU-Parliament debate about the refugee tragedy of *Farmakonisi* – European Responsibility." PRO ASYL. N.p., 06.02. 2014. https://www.proasyl.de/en/pressrelease/eu-parliament-debate-about-the-refugee-tragedy-of-farmakonisi-european-responsibility/. [Last access, 27.01.2017].

12 "Briefing on Farmakonisi Boat Wreck". Greek Council For Refugees, Hellenic League Of Human Rights, Network Of Social Support To Refugees And Migrants, Group Of Lawyers For The Rights Of Migrants And Refugees. N.p., 1 Aug. 2014. http://omadadikigorwnenglish.blogspot.gr/2014/08/briefing-on-farmakonisi-boat-wreck.html. [Last access, 27.01.2017]. See also: "Analysis by PRO ASYL regarding the death of eleven refugees near the island of *Farmakonisi*." PRO ASYL. N.p., 21.012014. https://www.proasyl.de/en/news/analysis-by-pro-asyl-regarding-the-death-of-eleven-refugees-near-the-island-of-farmakonisi/. [Last access, 27.01.2017].

survivor of Syrian nationality was found guilty by the Felony Appeal Court of Dodecanese in Rhodes for the offense of "facilitation of illegal entry to the country." He was convicted to 145 years of imprisonment, which, in accordance to the law, was reduced to 25 years.[13]

4.1. TURNING A CASE OF ILLEGAL "PUSH-BACK" INTO A CASE OF "SMUGGLING"

The outcome of the judicial investigation of the *Farmakonisi* case confirmed that illegal practices at the Greek borders are tolerated and politically protected, and that state officers on duty are granted immunity from prosecution. Human rights organizations and EU institutions were already aware of this situation, as they had access to other well-documented evidence of illegal "push-back" operations at the Greek-Turkish borders.[14] At that time, Greek government officials partially admitted to using such "push-backs" as a justifiable means in the "fight against illegal migration."[15] On the other hand, the penal treatment of the 21-year-old Syrian "smuggler" sheds light on a less investigated and less publicly debated feature of the border and migration control policies in Greece. The public discourse on migrant smuggling in Greece is dominated by a stereotypical figure of the smuggler. This image is interconnected with discourses on human trafficking, organized criminality, exploitation and violence, as well as with discourses

13 "Syrian man convicted to 145 years for *Farmakonisi* tragedy." To Vima Online. N.p., 06.02.2015. http://www.tovima.gr/en/article/?aid=674548. [Last access, 27.01.2017].

14 i.e. "Pushed back – Systematic human rights violations against refugees in the Aegean sea and the Greek-Turkish land border." *PRO ASYL*. N.p., Nov. 2013. https://www.proasyl.de/en/material/pushed-back-systematic-human-rights-violations-against-refugees-in-the-aegean-sea-and-the-greek-turkish-land-border/, and "Greece: Attacks on Boats Risk Migrant Lives." Human Rights Watch. N.p., 06 Nov. 2015. Web. 27 Jan. 2017. https://www.hrw.org/news/2015/10/22/greece-attacks-boats-risk-migrant-lives. [Last access, 27.01.2017].

15 In an interview in Alpha Channel in October 2013 M. Varvitsiotis said: "The first thing we do is to tell the Turkish authorities "come and get them"... in case they have not crossed the borders, or, anyway, to find a way to bring them back on the Turkish side", in "Autopsy at the Greek-Turkish Borders." *AlphaTV*. N.p., Oct. 2013. http://www.alphatv.gr/shows/informative/aftopsia/webtv/aytopsia-sta-ellinotoyrkika-synora. at 39:33 in Greek. [Last access, 27.01.2017].

on national security and the external threat posed by Turkey and by migration itself. In this context, elements resembling moral panic and the imperative to punish paradigmatic smugglers restrict the space of public deliberation over "smuggling" and discourage any social and legal support to persons accused of facilitation of illegal entry.[16] From this point of view, *Farmakonisi* can be seen as an exemplary case of the penal treatment of alleged migrant smugglers in general. It illustrates the effects of the implementation of a draconian law on "facilitation of illegal entry" as well as the recurring breaches of law in pre-trial investigations and within the administration of justice in general.

The young Syrian, a survivor himself of the tragedy of *Farmakonisi*, was identified as the driver of the boat by the Coast Guard and was immediately taken aside and separated from the others. The next day he was charged by the public prosecutor and the investigating magistrate with the offense of "illegal transport from abroad to Greece of third country nationals, who do not have a right to enter the Greek territory," a crime which, since 2009, is considered a felony subject to a sentence of over five years of imprisonment. Considering the seriousness of the crime committed – which in this case was kept separate from the investigation into the conditions of the shipwreck and the loss of lives[17]– the judicial authorities ordered his pre-trial detention. A year later, the case was brought before the Felony Appeal Court in Rhodes (February 2015) and after a hearing that lasted less than one day, the court convicted the young Syrian and imposed an independent penalty for each transported person. This led to an aggregated penalty of 145 years of imprisonment, reduced to 25 years in accordance with the

16 For an exception see: "Case *Farmakonisi* or The right of water", Anestis Azas, Experimental Scene of the National Theatre of Greece, in " Festiwal Prapremier. N.p., 18.09.2016. http://www.festiwalprapremier.pl/en/2016/08/16/case-farmakonisi-or-the-right-of-water-2/s. [Last access, 27.01.2017].

17 Although many misleading articles were published, i.e. "Syrian gets 145-year term for immigrant drownings | Kathimerini *News*. N.p., 06.02.2015. http://www.ekathimerini.com/167047/article/ekathimerini/news/syrian-gets-145-year-term-for-immigrant-drownings. [Last access, 27.01.2017].

law, and a fine of 570,500 Euros. The young Syrian appealed against the decision and is, as of February 2017, waiting for the court of second instance to hear his appeal, while remaining imprisoned in the Juvenile Prison of Avlona.

The *Farmakonisi* case revealed serious violations during the investigation procedure that are common in cases concerning facilitation of illegal entry, such as the absence of an interpreter and the exclusion of legal assistance for the accused person. Such infringements are frequently reported in cases where the witnesses and/or the alleged smuggler are themselves asylum seekers. In many cases, witnesses have claimed that they were not informed if they were accused, or were even pressed by the Coast Guard or police officers into signing documents in a language that they did not understand. In general, pre-trial investigations are held under stressful conditions and pressure, as they are usually conducted directly after the border crossing and often after a rescue operation. Given that the witnesses in such situations have just entered the territory and are held in custody, often without any information about their case or psychological support, it is evident that many of their testimonies are the product of pressure and therefore often of disputed reliability.

Another issue that emerged in the case of *Farmakonisi* concerns the assessment of the evidence by the court. It is common in cases concerning the offense of facilitation of illegal entry that the witnesses do not appear before the court, especially if the witnesses are themselves asylum applicants, as they may have left the country or have an unknown residence. It is also common in such cases that police and coast guard officers try to avoid appearing before the court. This is often the case when the prosecuting evidence consists exclusively of written testimonies from the arresting officers, and only written testimonies of the witnesses. As in the case of *Farmakonisi*, the court has to consider poor evidence that is often widely disputed.

Lastly, the case of *Farmakonisi* stresses Greek law's infringement of the principle of proportionality when it comes to sentencing for the offense of facilitation of illegal entry. By prescribing independent penalties for each transported person, the law leads to aggregated sentences that often reach or surpass the maximum time of imprisonment permissible under Greek law, which is 25 years of imprisonment. This manifest lack of proportionality raises serious questions over the compliance of Greece's migration legislation with the Greek Constitution, as well as with the European *Convention on Human Rights*.

5. THE FUNCTION OF THE LEGAL TROPE OF "SMUGGLING": HUMANITARIAN AID VERSUS COMBATING "ILLEGAL" ENTRY

As the European Union and its Member States consider themselves democratic societies, political decisions rely on the endorsement of the population. According to this logic, political decisions need to be legitimated in line with dominant social attitudes.

In combating "illegal" migration, the EU-European border and migration regime is shaped by three political rationales that legitimize political decisions: humanitarianism/human rights, security, and exclusion. The figure of the "smuggler" captures exactly the matrix of humanitarian aid, security and exclusion. Ever since the numerous deaths on the EU-European borders began to raise public attention and restrictive migration laws that violate the fundamental rights of migrants in terms of international protection, labor, housing and health, many political parties, human rights organizations, activists and public media outlets have criticized the political treatment of migrants and argued against these violations of human rights (Cuttita, 2010: 34). The five cases discussed here reflect this trend, as they all triggered public criticism and were accompanied by solidarity actions from activists.

This human rights-centered criticism forces EU-European policy offi-

cials to legitimate repressive measures against migrants. In this process, migration is generally objectified as a problem, a topic of discussion and in need of a political solution. In these discussions however, the migrant is never recognized as a person with agency and the ability to communicate (Feldman, 2011: 8). As such an object, migration is framed by two perspectives that are very important when it comes to legitimating political decisions in combating "illegal migration" and therefore human smuggling. On the one hand, in public discourse, the migrant is presented as an individual that needs protection. If migrants are presented as in need of protection, a mechanism of victimization follows. In this logic, migrants are objectified as victims devoid of agency, unable to make their own decisions, such as wanting to cross borders and ask for the help of facilitators. On the other hand, these same migrants are presented as dangerous individuals that threaten national security, which is highly connected to terrorism, reinforcing the need for political security measures. The construction of the "illegal migrant" as a national threat is based on two ideas: Firstly, the "illegal" migrant could be a terrorist and harm national security through terrorism. Secondly, illegalized migration endangers the national political order as it questions the state's ability to obtain the security of a national sovereign territory. This also underlines the existence of alternative possibilities to the current global political, that is, the organization of the world into sovereign national states (Ratfisch/Scheel, 2010: 106).

In the name of fighting "illegal migration," the legal figure of the "smuggler," constructed as a threat to the "vulnerable migrant," is used as bogeyman to justify the harsh criminalization of anyone who in any way assists others in crossing borders. This construct provides a humanitarian guise that helps legitimate harsh criminalization and security measures that often undermine the actual humanitarian interests of migrants. It also serves to deflect attention from the fact that states' unwillingness to provide legal avenues for travel is a main driver behind the reality of migrant vulnerability.

All of the cases discussed in this report reflect this pattern of objectification. The case of Hanna L. in Germany demonstrates how the discursive construction of his activities as a "smuggling ring" simultaneously casts migrants as victims in need of protection, while also constructing Hanna L.'s actions as terror-related, requiring the activation of the security apparatus. The cases of *Cap Anamur*, the Tunisian Fishermen, and *Farmakonisi* reflect the construction of threats to national sovereignty as justification for fighting illegalized migration. In these cases, illegalized migration is seen as causing a situation of chaos on the Mediterranean Sea, as various non-state actors get involved in sea rescues and, in so doing, challenge state-run sovereignty. How these legitimating strategies, tightened since 2015, are implemented in concrete political strategies will be seen in the following chapter.

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2.3. GENERAL OVERVIEW: CURRENT POLITICAL STRATEGIES

by Sara Bellezza (borderline-europe)

As seen in the previous chapter, two legal frameworks – both an international and an EU-European framework – criminalize escape aid, meaning the act of providing assistance to people fleeing across borders, whether done for financial gain or not. Providing escape aid is often negatively referred to as "smuggling." Therefore, in addition to exploring the legal aspects of the criminalization of escape aid, this report also seeks to understand EU-European political strategies concerning smuggling. Accordingly, the following section will outline different EU-European policies and actions taken to combat smuggling and implement military interventions in the Mediterranean Sea between 2015 and 2017.

From the 1990s onward, more than 30,000 people have died on their escape journeys through the Mediterranean Sea (Fortress Europe, 2016; Missing Migrants Project, 2017). From time to time, shipwrecks with a bigger number of people drowning cause a lot of attention in the media. One example is the shipwreck that occurred in front of the Italian island of Lampedusa in 2013, in response to which even the Pope declared his compassion (Bianchi, 2013). However, most of the time, the media does not report on the constant drownings that occur because people are forced to continue travelling on the dangerous sea route between Libya and Italy, as they have no safe and legal way to reach EU-Europe. A turning point occurred when two boats carrying more than people from Libya to Italy sank in April 2015. An exception was the sinking of two boats carrying more than 900 people from Libya to Italy in April 2015. This sparked a new EU-European-wide outcry about the tragedy and EU-Europe's responsibility for the continuous shipwrecks. While most civil society organizations declared the EU-European border regime and closed border policy responsible

for the shipwrecks, EU politicians such as Italy's former Prime Minister Matteo Renzi and Federica Mogherini, the High Representative for Foreign Affairs of the European Union, blamed the so-called smuggler networks for causing so many deaths (Bonomolo/Kirchgaessner, 2015; Traynor, 2015).

While the European Union establishes ever stricter border controls, it has yet to consider providing other travel alternatives for people. Rather, what the EU did consider after the sinking of the two boats mentioned above in 2015 was the creation of a *Ten Point Action Plan on Migration* (European Commission, 2015a) and an *Action Plan against Migrant Smuggling* (European Commission, 2015b). Both Action Plans form a major part of the *European Agenda on Migration* (European Commission, 2015d), which was adopted by the European Commission on 13 May 2015, declaring the fight against smuggling as a priority for migration policies, as well as a major security issue inside the EU (European Commission, 2015b). Moreover, the European Union initiated a military operation in the Mediterranean Sea called *EUNAVFOR MED* (Monroy, 2015) with the same goal. Another major development in EU politics between April 2015 and the beginning of 2017, was the cooperation between the EU and the Libyan Coast Guard in the so-called *Operation Sophia* (CFSP 2016/1635). *Operation Sophia* is part of the *EUNAVFOR MED* mission to tackle smuggling operations (ibid.). Despite the Libyan Coast Guard's attacks on non-governmental rescue boats, such as boats of the organizations *Sea Watch* and *MSF (Médecins sans frontières)* (Sea Watch, 2016a; Scherer et al., 2016), the EU continues this cooperation. By the end of 2016, *Frontex*, the EU border agency, even went as far as accusing non-governmental rescue boats of cooperating with smuggler networks (Robinson, 2016; Sea Watch, 2016b).

Furthermore, as a consequence of the so-called *Summer of Migration* in 2015 (Kasparek/Speer, 2015), in which many people reached Europe by travelling from Turkey through different Balkan countries, a

deal between the EU and Turkey was signed in March 2016. It aims to prevent people from travelling via the land route and the sea between Turkey and Greece, which is shorter than the Libyan-Lampedusa route (Alexander et. al., 2016; DBT, 18/8542).

All of these developments will be outlined in detail below.

1. THE *TEN POINT ACTION PLAN ON MIGRATION*

The *Ten Point Action Plan* adopted by the EU Commission in April 2015 comprises ten measures aimed at directly changing the "dire situation in the Mediterranean" (European Commission 2015a). Federica Mogherini, High Representative of the European Union for Foreign Affairs and Security Policy as well as Vice President of the European Commission, and Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, issued a common statement on the EU's willingness to take responsibility in times of crisis (ibid.). The Action Plan contains measures to extend the *Frontex* operations *Triton* and *Poseidon* in the Mediterranean Sea by giving them a higher budget and more equipment. This measure is represented in the Plan as a "Search and Rescue Operation" (SAR) and, as such, a continuation of the Italian government's naval and air operation *Mare Nostrum* (Kasparek 2015), which saved more than 150,000 people between 2013 and 2014. However, *Frontex's* chief executive Fabrice Leggeri has described *Frontex* as a border guard agency and not a search and rescue operation agency. To save the lives of migrants, he has made clear, would not be the *Frontex* mandate (Kingsley/Traynor, 2015). In contrast, the European Commission (2015d) presents the decisions taken in the *Ten Point Action Plan* as life-saving provisions, stating that:

> The immediate imperative is the duty to protect those in need. The plight of thousands of migrants putting their lives in peril to cross the Mediterranean has shocked us all. As a first and immediate re-

> sponse, the Commission put forward a ten point plan for immediate action. The European Parliament and the European Council have lent their support to this plan and Member States have also committed to concrete steps, notably to avert further loss of life. (ibid.: 2)

Yet, contrary to the protection of people's life, the second measure of the *Ten Point Action Plan* foresees a military intervention to capture and destroy smuggling vessels, represented as a combined *civilian and military intervention* (European Commission, 2015d). The EU's counter-piracy operation *Atalanta* near the coast of Somalia is intended to serve as a model for the Mediterranean Sea (European Commission, 2015a). As a result of this decision, the *EUNAVFOR MED* Mission, which will be depicted in the following section, was established (Monroy, 2015).

Further steps prescribed in the *Ten Point Action Plan* include the fingerprinting of all migrants, the provision of teams for the joint processing of asylum applications (sent to Italy and Greece by the *EASO*, the European Union's asylum support office), emergency relocation mechanisms between the Member States, and a voluntary pilot project for resettling refugees across the EU.

According to a new program for the rapid return of "irregular migrants" also established in the *Ten Point Action Plan* and to be coordinated by the EU Agency *Frontex*, whoever manages to enter EU-Europe in spite of the tough border controls will be subject to deportation (European Commission 2015a). The last two points of the *Ten Point Action Plan* include the EU's engagement in non-EU-European countries, such as Niger, as well as Libya and its surrounding countries (ibid.). In this vein, the EU decided to send "Immigration Liaison Officers" (ILO) to "key third countries." Such examples of border and migration control strategies beyond EU-European borders are described as *border externalization strategies* that attempt to control migration in countries

outside EU territory, such as Egypt, Eritrea, Ethiopia, South Sudan, Sudan and others.[1]

While the *Ten Point Action Plan* was issued as a quick response to the mass drowning in April 2015, all the points mentioned in the Plan can also be found in the later *EU Action Plan against Migrant Smuggling*. In this sense, the latter can be considered as a continuation of the *Ten Point Action Plan* in that it includes more details and concrete actions to be taken. The *EU Action Plan against Migrant Smuggling* was the result of the decisions taken by the European Commission in the framework of the April 2015 *Agenda on Security* and the May 2015 EU-European *Agenda on Migration* (European Commission 2015b). Both agendas "identified the fight against smuggling as a priority" and implemented the *EU Action Plan against Migrant Smuggling* as a guideline that "sets out the specific actions necessary to implement the two agendas in this area and incorporates the key actions already identified therein" (ibid.: 1).

2. THE *EU ACTION PLAN AGAINST MIGRANT SMUGGLING*

What makes the *EU Action Plan against Migrant Smuggling* particularly interesting is its argumentative structure as well as its emphasis on smuggling as a form of organized crime. In contrast to the EU *Facilitation Directive* from 2002, explained in the previous chapter, the EU uses a different vocabulary in the 2015 *EU Action Plan against Migrant Smuggling*. Indeed, providing assistance to people fleeing is no longer referred to as "facilitation of illegal entry," as mentioned in the *Facilitation Directive*, but as "smuggling" (European Parliament, 2016). In us-

1 For further information on the "cooperation" of the EU with African countries, read about the Rabat and Karthoum Process, as well as the Valetta Summit from 2015 (European Commission 2015c). Each "cooperation" affects different African countries and considers the fight against "smuggling" procedures in these countries as a major issue. The border control mechanisms should be implemented even between countries where usually free movement of people is possible.

ing the term "smuggling," the newer EU Action Plan makes an explicit reference to the *UN Protocol against Smuggling*. While the *EU Action Plan against Migrant Smuggling* distinguishes between smuggling and trafficking, it simultaneously highlights migrants' vulnerability during smuggling operations and how they, hence, run the risk of becoming victims of human trafficking (European Commission, 2015b). These same statements are also found in the *UN Protocol against Smuggling* (European Parliament, 2016). Furthermore, the *EU Action Plan against Migrant Smuggling* uses humanitarian arguments to justify military and police interventions. By depicting migrants as victims of smuggling operations, these statements imply that migrants should be excluded from punishment, whilst smugglers should be criminalized as members of organized crime networks (European Commission, 2015b: 6). However, the *EU Action Plan against Migrant Smuggling* also recognizes that people voluntarily and actively look for smugglers to transport them, as many people have no legal way to reach EU-Europe. As such, the Action Plan mentions the need for creating safe travel routes, but also underlines the importance of enhancing "return operations" (ibid.: 7-8). These deportations are meant to induce fear and prevent people from travelling on irregular routes, or, as the Action Plan claims:

> To deter potential migrants from trying to reach the EU by using smugglers' services, it has to be made clear to them that they will be returned swiftly to their home countries if they have no right to stay in the EU legally. For the moment, smuggling networks exploit the fact that relatively few return decisions are enforced to attract migrants. (ibid.: 7)

Thus, the *EU Action Plan against Migrant Smuggling* describes smuggling as part of the root causes for "irregular migration" (European Commission, 2015b: 1-2) and again underlines the importance of strengthened cooperation with the African, Caribbean and Pacific Group of States

(ACP),[2] as well as others (ibid.: 8). In addition, the Action Plan suggests raising awareness of the risks of smuggling and emphasizes the need to create a counter-narrative in the media to inform migrants about the hazardous journeys (ibid.: 6).

Moreover, the *Action Plan against Migrant Smuggling* introduces the "sea border" as a crucial location for preventing smuggling operations. It therefore demands a strengthening of the *Joint Operational Team* (JOT) *MARE*, and a stronger association between *Frontex* and the new *Common Security and Defense Policy (CSDP)* Operation *EUNAVFOR MED* (European Commission, 2015b: 5)

3. *EUNAVFOR MED*

The European Union Naval Force Operation Mediterranean *EUNAVFOR MED* was established on 22 June 2015 by the European Council. Its declared aim is to identify, capture, and dispose of vessels and other vehicles used to transport people by so-called smugglers (European Council, 2015). A "four phases" working plan for the Operation was established by the Political and Security Committee of the EU. The first phase is aimed at identifying and detecting smuggling networks near the Libyan coast (Monroy, 2015). In the second phase, boats driving without clearly marked state flags crossing from the Libyan coast to Italy should be stopped, searched and confiscated (ibid.). The third phase involves sending EU ground forces to Libyan territory, while the whole Operation should be handed over to Libyan authorities at some undetermined moment as the fourth phase (ibid.). Even though the High Representative for Foreign Affairs and Security Policy, Federica Mogherini, explained that "(t)he targets of this operation are not

2 For further understanding, read about the Africa *Frontex* Intelligence Agency (AFIC) on *Frontex* 2016: http://frontex.europa.eu/news/frontex-publishes-africa-frontex-intelligence-community-afic-report-5K2fXQ and European Commission 2015c: http://europa.eu/rapid/press-release_MEMO-15-4832_en.htm. [last access 11.01.2017].

the migrants, the targets are human smugglers and traffickers, those who are making money off their lives and too often on their deaths. *EUNAVFOR MED* is part of our efforts to save lives" (European Council, 2015b), the *EUNAVFOR MED* mission officially contributes to controlling the sea border and stopping "irregular migration" between Libya and Italy (Andres, 2016: 13). This active border control then prevents people from trying to save their lives by leaving Libyan territory. On top of this, one of the major consequences of the *EUNAVFOR MED*'s efforts to destroy "smuggling" boats has been the use of even more fragile boats by the smuggling operators (ibid.: 14). Furthermore, the practice of "identifying and arresting smugglers" on arrival in Italy does not follow humanitarian conventions. The inhuman interrogations led by *Frontex* and other operators of *EUNAVFOR MED* are examined in more detail in the country report on Italy (Chapter 6).

Since the start of the military operation in June 2015 until January 2017, nine EU Council Decisions have been taken to lead the *EUNAVFOR MED* mission from phase one to phase two, and to add further measures to it (*EUNAVFOR MED*, 2016). The operation's name was changed in September 2015 to *Operation Sophia*, in honor of a Somalian baby born on one of the German military ships during a rescue operation (Andres, 2016: 13). At the same time, the launch of the second phase was announced (CFSP 2015/1772). While the name is intended to give the operation a further humanitarian appearance by praising itself as a life-saving mission, more than 5,000 people died during sea crossings in 2016 (IOM, 2016). Furthermore, the operation functions as a continuation of prior attempts by the EU and Italy to control the Libyan border, such as the EUBAM Mission in Libya in 2013[3] or the

3 The European Border Assistance Mission (EUBAM) in Libya, implemented by the European Council in 2013, aimed to protect Libyan borders from migrants after Gaddafi's overthrow, as well as to secure Western oil refineries. For further information about EUBAM and its connection to the Libyan civil war, see Monroy 2014. Its mandate is explained in EUBAM 2016.

former agreements between Italy and Muammar al Gaddafi[4] (Monroy, 2015a; Triulzi, 2013).

In August 2016, the European Council assigned two further tasks to the mission. The first one includes the training of Libyan border guards and marines, at first on board European Naval ships at sea, and subsequently, either in an EU Member State or on Libyan territory (CFSP 2016/1635). Additionally, an EU Council Decision from September 2016 stated that *Operation Sophia* would contribute to the implementation of the UN arms embargo on the high seas off the coast of Libya (CSFP 2016/1637). The UN resolution from January 2016 thereby allows the EU military intervention to operate in Libyan waters (CFSP 2016/118).

In the following chart, the actual outcomes of the *EUNAVFOR MED Operation Sophia* are presented. The neutralization of vessels and the control of arms outnumber the rescue operations. Considering the high number of EU vessels operating in the area, it is questionable why only 31,899 people were rescued, while more than 5,000 died (Missing Migrants Project, 2017).

4 Various agreements between Italy and Libya's former president Muammar al Gaddafi were aimed at inhibiting free movement of people across Libya's borders. For further information, see Triulzi 2013.

5

As mentioned in the introduction to this chapter, the Libyan Coast Guard is known to have attacked several NGO search and rescue boats (Sea Watch, 2016a; Scherer et al., 2016). The next section will therefore outline the events that happened before and after the official start of the *EUNAVFOR MED Operation Sophia* phase involving the training of Libyan coast guards.

5 *EUNAVFOR MED Operation Sophia* 2016: https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/3790/eunavfor-med-operation-sophia_en [last access 08.02.2017].

The EUBAM mission to train the Libyan Coast Guard already started in 2013 (EUBAM, 2016) and its mandate was extended twice until August 2017. While one of its official aims is to contribute to the transition to democracy and a stable political situation in Libya (EUBAM, 2016), its main activity concerns the training of Libyan authorities in the field of "border management." Not only is the link between its official aim to contribute to democracy and the training of border guards highly questionable, the mission itself caused severe problems in the Libyan civil war, resulting in the transferal of the mission to Tunisia (Monroy, 2014).[6] Like the EUBAM mission, *Operation Sophia* trains Libyan border guards to prevent people from leaving the Libyan coast. The first training session took place off the coast of Libya on two military ships provided by Italy and the Netherlands from October to December 2016. For this session, the instructors and equipment were provided by Germany, Italy, Greece, Belgium and Britain (Scherer et. al., 2016).

The training has been highly criticized by numerous human rights and non-governmental search and rescue operations (AlarmPhone, 2017; Sea Watch, 2016a; MSF, 2016). The controversy intensified when members of the Libyan Coast Guard attacked the *MS*F-led boat *Bourbon Argos* in August 2016. Whereas *MSF* explained that the Libyan Coast Guard fired several shots at the boat, even boarded and stayed on it for 50 minutes, Libyan Navy spokesman Brig. Ayoub Qassim assured that the Coast Guard only fired some warning shots in the air to force the boat to stop and identify itself (Kingsley/Stephen, 2016). While nobody was hurt during the attack, the threat for humanitarian organizations operating at sea is increasing. *MSF* has been conduct-

6 According to the former Libyan Prime Minister, parts of the so-called "border guards" fought together with General Chalifa Haftar against the interim government in 2014. While the training mission should have promoted peace and stability by disarming the militia, the guards were involved in the fighting around power in Libya (Monroy, 2014).

ing search and rescue operations in the Mediterranean Sea for more than two years (Kingsley, 2016). However, the statement by spokesman Qassim that Libya does not agree with the EU *Operation Sophia* patrolling Libyan waters could be understood as a hint that the attack was intended to harm *Operation Sophia*. Qassim has also argued that the military operation has hidden intentions other than rescuing and protecting migrants, such as entering Libyan territory for the exploitation of oil reserves (Libya Observer, 2016). However, it remains unclear as to whether the attack by the Libyan Coast Guard explicitly sought to hinder *Operation Sophia*.

In October 2016, another attack on the humanitarian search and rescue boat *Sea Watch* caused the death of more than 20 people (Sea Watch, 2016a). While the organization was conducting a rescue operation for 150 people on a dinghy, the Libyan Coast Guard attacked the people on the boat with sticks and prevented the *Sea Watch* crew from distributing life jackets, causing a mass panic on board that led to the capsizing of the boat (ibid.). The actions of the Libyan Coast Guard were a clear violation of human rights and a breach of international maritime law, which raises further doubts about the cooperation between the EU and Libya to control migration.

In addition to the inhuman attacks during rescue operations, *Frontex* and the EU have also issued accusations against humanitarian organizations carrying out sea rescues, claiming that the NGOs collaborate with Libyan smugglers[7] (Robinson, 2016). The accusations of *Frontex* can be considered a form of intimidation and threat towards rescue organizations. If these accusations lead to the criminalization and pros-

7 Libyan "smugglers" are, in contrast to the people actually driving the boats, known for mistreating and abusing the people they put on the boats. The relations between the Libyan smuggling industry and the drivers of the boats is outlined in more detail in the Italian country report. In many cases, the Libyan smuggling turns into human trafficking, when people are extorted and exploited, and strong physical violence is enacted to receive more money from them before allowing them to pursue their travel. Under no circumstances have the voluntary SAR operations cooperated with such criminal behavior.

ecution of NGOs, the temporary suspension of NGO rescue activities could lead to a further increase in the number of people drowning in the Mediterranean Sea (Sea Watch, 2016b).

5. *FRONTEX* AND THE CRIMINALIZATION OF HUMANITARIAN SEARCH AND RESCUE (SAR) OPERATIONS

According to the Financial Times, *Frontex*, in a confidential report, accused humanitarian rescue organizations of cooperating with Libyan smugglers, "smuggling migrants on an NGO (non-governmental-organization) vessel," as well as giving people clear instructions before their departure about how to reach the NGO rescue boats, and warning people not to cooperate with Italian law enforcement or *Frontex* authorities (Robinson, 2016). While *Frontex*' accusations are based on a *EUNAVFOR MED* comment, the accusations involve the assumption that distress calls have decreased since a higher number of NGO rescue operations began taking place in the Mediterranean Sea (ibid.). It is difficult to understand how this proves cooperation between smuggling operators and NGO vessels. The NGOs' clear intention to save people from distress cannot be considered collaboration with smuggling operators. When NGOs are forced to take over responsibilities that the state, or in this case the EU, should fulfill, and the very same state authorities try to criminalize their rescue operations, the political priorities of the EU and its Member States become ever more evident - to close the borders, even if it costs human lives. Moreover, to blame NGOs for not cooperating with border guard authorities because the NGOs refuse to give them information about the people on board fails to understand their actions. Aurélie Ponthieu from *MSF* underlines that it is neither the responsibility nor the wish of *MSF* to undertake border police tasks. This refusal to actively cooperate in border policing still does not demonstrate any form of cooperation with smuggling operations (MSF, 2016).

As stated by *MSF* as well as *Sea Watch*, the criminalization of people fleeing for different, but nonetheless justified reasons, must be stopped immediately (Sea Watch, 2016b; MSF, 2016). The same goes for the cooperation between the EU and the Libyan Coast Guard, which, besides attacking humanitarian organizations, is also responsible for illegal "push-backs" on international waters (Sea Watch, 2016b). In a situation where voluntarily search and rescue operations are criminalized and *Frontex* is granted ever more operating powers, it must be questioned whether the European Union is truly committed to respecting human rights and its international legal obligations towards refugees. Furthermore, any alleged "fight against smugglers" can only be understood as a fight against migrants, who are forced to resort to such "smuggling" services because the borders are closed. The only way to stop the smuggling business is to respect the freedom of movement for everybody and enable people to travel on legal routes.

6. *FRONTEX*'S NEW POWERS

When *Frontex* was established in 2004 as the EU Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, its mandate and budget was limited and highly dependent on the Member States' assignment[8] (EC 2007/2004). With the decisions taken in the *Ten Point Action Plan on Migration* and the *EU Action Plan against Migrant Smuggling* in 2015, *Frontex* received a higher budget and further operational responsibilities. The new Council Decision (EU) 2016/1624 from the European Council and the European Parliament includes an amendment of the original responsibility granted to *Frontex* and greatly widens its areas of influence (ibid. Article. 11). *Frontex*'s new name, the *European Border and Coast Guard Agency*, already refers to its possibility to intervene in

8 The *Frontex* Budget increased from 19,166,300 Euros in 2006 to 254,035,000 Euros in 2016 (*Frontex* 2007; *Frontex* 2015). This gradual increase of budget was accompanied by an enlargement of operational tasks every year.

Member State decisions about border control. This is further shown in *Frontex*'s new mandate to establish, in addition to the usual "risk analysis," vulnerability assessments of Member States. In practice, this means that *Frontex* is, per article 28 of the Council Decision, enabled to force a European Union Member State to take certain measures at its borders. Even though such a decision would require EU Council approval, *Frontex* can oblige a Member State to take measures that have to be implemented within 30 days to "protect" its borders (ibid.). The failure to implement these measures can then lead to sanctions. Besides, *Frontex* is authorized to create a "new rapid reaction pool" with 1,500 border guards to react to "immediate threats" at the EU borders (Article 29). As *Frontex*'s main task is to "protect" the EU borders, it uses the strong anti-smuggling discourse for implementing and controlling ever stricter border policies and control mechanisms (Frontex, 2016a). With its extended mandate, it is also entitled to not only organize collective deportations, but even to acquire travel documents for people forced to leave EU-Europe without their consent (EU 2016/1624 Article 32-35). Boasting about itself, with deportations for more than 10,000 people in 2016 and over 900 deportations from Greece to Turkey, *Frontex*'s new "return pool" granted through the extended mandate consists of 690 deportation "specialists" (Frontex, 2017).

A major contradiction in *Frontex*'s "border control approach" becomes evident in one of their statements about smugglers and people migrating. *Frontex* explains that people try to cross borders several times until their attempt is successful, and even acknowledges that an intensification of border controls only leads people to cross at another, less surveilled point (Frontex, 2017a). This fact is clearly illustrated in *Frontex*'s analysis about reduced migration on the eastern Aegean (ibid.). If *Frontex* is aware of these dynamics, then its statements and actions enforcing border controls and "fighting" smuggling with the aim of preventing migration to the EU and of protecting people from threats that can occur when travelling on so-called "clandestine" routes, seems

even more paradoxical.
As *Frontex* notes, the currently reduced number of people crossing from Turkey to Greece is due to the March 2015 *EU-Turkey Deal* (ibid). The content of the agreement and its connections to the so-called *Summer of Migration* will be outlined in the next section.

7. THE *SUMMER OF MIGRATION*

During the summer of 2015, an increasing number of people from Syria, Afghanistan, Iraq and Eritrea started entering Europe through the Balkan countries, a route which is nowadays known as the so-called Balkan Route. The humanitarian emergency caused by war and terror in their countries, and their sheer determination to flee, actually overwhelmed and overcame significant portions of the EU border regime mechanisms, leading to this period being named the *Summer of Migration* (Kasparek/Speer, 2015). During this summer, the Dublin System[9] was suspended for a number of months and people could, until the formal closing of the borders in autumn 2015, move "relatively freely" from Greece to Macedonia, and then make their way through Serbia, Hungary and Austria in order to arrive to other Northern EU-European countries, such as Germany and Sweden (MovingEurope, 2016). While the occurrences on the so-called Balkan Route and the *Summer of Migration* reach beyond the aim of this report, it is still important to understand their meaning for the implementation of the *EU-Turkey Deal*. As it provided a relatively "easy way" to cross borders, the so-called Balkan Route was a thorn in the EU-European countries' attempt to control migration and prevent the further arrival of people seeking protection. The term "easy way" only relates to the fact that, for a certain time, no border controls prevented people from crossing borders along the route, and sometimes certain states even provided

9 Under the Dublin System, people who seek asylum in EU-Europe have to do so uniquely in the Member State of first entry. If they continue travelling to another country, they can be deported back to the first country of arrival.

free public transport. Yet, it is important to highlight that this does not infer that people were able to travel in comfortable conditions, as most EU citizens do.

This period did not last very long and political measures taken by the EU and its Member States, as well as the non-EU Balkan countries, resulted in growing travel restrictions along the so-called Balkan Route. In September 2015, even public transport means were shut down. People were then forced to walk and often got stuck at newly erected border control points (ibid.). From 18 November 2015 onwards, only certain nationalities were allowed to cross these border controls, amounting to a clear breach of the international obligation of non-refoulment[10] (Bordermonitoring.eu, 2016). Due to this dividing practice, which was in accordance with the dominant public discourse in EU-Europe that differentiated between "good" and "bad" refugees, the only people allowed to cross the border were people from Afghanistan, Iraq, and Syria. One of the consequences of this was the establishment of the well-known camp "Idomeni" at the border between Greece and Macedonia, where between 2,000 and 10,000 people were waiting for the possibility to continue their way further north (ibid.). There was extensive media coverage of the humanitarian state of exception that prevailed in Idomeni and other camps established at border crossing points, where people were left for months without consistent access to housing, food, sanitary services or education for children. Despite widespread knowledge of the inhumane conditions at these camps, the EU did not reopen the borders to formally allow people to cross. The constructed nature of the EU as a defender of human rights, and the narrative about "good refugees" who flee from war and persecution versus "bad refugees" who "only" look for ways to survive due to economic reasons, became ever more evident when the borders were

10 According to international law, every person has the right to seek for asylum and must be heard by the destination countries' authorities. Collective "push-backs" on the basis of nationality are therefore illegal and against the human rights of any person (UNHCR 1977).

also formally closed for people from Afghanistan, Iraq, and eventually also Syria. Despite the constant state of insecurity in Afghanistan, the EU has now labelled the country a safe country of origin, enabling the EU Member States to deport asylum seekers back to Afghanistan (Statewatch, 2016).

After that, the borders in Slovenia, Croatia, Serbia, Macedonia, Hungary, Bulgaria and Austria were also formally closed,[11] leaving the route through the Aegean Sea between Turkey and Greece as the only remaining "free way"[12] to reach EU-Europe.

Therefore, in March 2016, the European Council decided to establish the *EU-Turkey Deal* to "manage the migration crisis" and prevent people from crossing from Turkey to Greece.

8. THE *EU-TURKEY DEAL*

The Council Decision, taken by the governmental heads of the EU Member States, includes the obligation for Turkey to accept the return from Greece of all migrants, who supposedly do not need international protection. Furthermore, Turkey is supposed to take back all "irregular migrants" found in international waters (DB 18/8542). This decision legalizes the formerly illegal practice of "push-back" operations in international waters, in breach of the international law obligation of non-refoulment. For every Syrian person returned, another Syrian person staying in Turkey should be allowed to enter the EU legally. The reason why someone who makes the dangerous journey and manages

11 Fences of different lengths and strengths were erected in Hungary, Bulgaria, Slovenia and in Austria (Sputnik 2016)

12 "Free" is used with quotation marks, as the crossing from Turkey to Greece on small boats is as dangerous as crossing from Libya to Italy. It is highly dependent on the weather conditions and on the quality of the boats used. However, the way between Turkey and the Aegean Islands is a lot shorter, and therefore, generally safer than the longer route from Libya to Italy.

to survive should be pushed back and, in essence, "exchanged" for another person instead, is not further explained. Further calling the deal, which purportedly respects human rights, into question, is its stipulation that people from other nationalities are to be excluded from the regulation (ibid.). Moreover, Turkey will receive 6 billion Euros by 2018 and was promised a lifting of visa requirements for Turkish citizens, as well as a review of Turkey's accession to the EU.

Despite the *EU-Turkey Deal*, Turkey should not be qualified as a "safe country" because of its own internal political situation[13] (DB 18/8542; Alaaldin, 2016). Besides, Turkey retains a geographic limitation to its ratification of the 1951 *UN Convention on the Status of Refugees* (*Refugee Convention*), which means that only Europeans can obtain protection as refugees in Turkey. Turkey grants Syrian citizens the status of "conditional refuge." However, human right groups argue that this status should not be seen as equivalent to formal refugee status under the 1951 *Refugee Convention* (Amnesty International, 2016).

Since March 2016, *Frontex*'s Rapid Intervention Operation *Poseidon* has collaborated with a *NATO* mission established in the Aegean Sea. Both missions aim at assisting the Greek and Turkish border guard authorities in their "fight" against the smuggling business, which they hold responsible for the high number of people crossing in 2015 (Dahlburg, 2016). A statement by former UK Prime Minister David Cameron clearly demonstrates that the mission aims to return people seeking asylum: "That's why this *NATO* mission is so important. It's an opportunity to stop the smugglers and send out a clear message to migrants contemplating journeys to Europe that they will be turned back" (Dahlburg, 2016).
As the effects of the *EU-Turkey Deal*, which had led to the return of

13 For further background information on why Turkey should not be considered a safe third country, see the Statewatch Analysis "Why Turkey is not a safe country" (Roman et al. 2016).

801 people up until January 2017 (Tagesschau, 2017) are, according to *Frontex*, not sufficient, the border guard agency intends to charter an additional three ships to carry out weekly deportations of a minimum of 100 people per boat from the Greek islands to Turkey (HarekAct, 2017). Continuing developments related this decision can be followed on the blog *HarekAct*, which reports on human rights violations in the context of the *EU-Turkey Deal*.

Even on this route, the use of military ships (as deployed by the *NATO* mission) to "fight" against smugglers can only be regarded as an excuse to hinder migration and create fear among people fleeing from war and difficult life circumstances.

9. CONCLUSION

The measures and political strategies implemented by the EU between 2015 and 2017 do not, as shown in the previous paragraphs, respect human rights. The fingerprinting of migrants is just one part of the securitization paradigm in which today's EU political imperatives have led to allowing the implementation of ever stronger control mechanisms for extending the exclusion of people, even up to the point of militarizing the borders. At the same time, relocation and resettlement programs barely take into consideration people's preferred country of residence. Such programs are not a viable solution anyway, as they are directed at and can only encompass a small number of people in comparison to the high number of people in need.

Recognizing the use of humanitarian language to criminalize escape aid and justify military interventions is an important step along the way to finding new alternatives for the current political structures and strategies that fail to respect people's right to freedom of movement and their choice to stay, as well as the right to asylum. Besides not respecting or even taking into consideration individual reasons for

migrating, the predominant discourse inside the EU that divides migrants along lines of "good" and "bad" refugees only contributes to racist thinking. Furthermore, as shown by the discriminatory closing of the borders along the so-called Balkan Route on the basis of nationality, the question of whether people fleeing from war should be recognized as "good refugees" highly depends on the EU-European definition of what should be considered a safe country, and what counts as a situation of war. The cooperation on migration control between the EU and non-EU countries, such as Libya, Turkey, Afghanistan and others, cannot be considered a solution for solving the global injustices and armed conflicts that force people to migrate.

Moreover, it is highly questionable whether a military intervention that destroys boats used to transport people seeking protection is actually protecting those very same people. The fact that EU border authorities, such as *Frontex* and the military mission *Operation Sophia*, contribute to criminalizing search and rescue operations by NGOs while claiming to do so in the name of human rights, is more than contradictory.

This report advocates for the freedom of movement for everybody and against the general demonization of smugglers, who, in some instances, provide essential services for people otherwise unable to move. The following chapters and country reports will further discuss different examples of "smuggling operators."

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3. COUNTRY REPORT AUSTRIA

by Carla Küffner (Asyl in Not)

1. HISTORICAL-LEGAL BACKGROUND: DEVELOPMENT OF THE OFFENSE OF HUMAN SMUGGLING

Throughout history, the concept of human smuggling/escape assistance[1] has undergone a considerable shift in meaning. After the end of the Cold War, the prevailing positive perception of escape assistance (see historical legal background in the country report for Germany) radically changed. During the opening of the "Eastern Bloc" borders, human smuggling came to be identified as a "problem" at both national and international levels, and became increasingly criminalized (Schloenhardt, 2015). In 1990, Austria's Parliament passed legislation proscribing human smuggling as an administrative and criminal offense, depending on its severity.[2] It defined human smuggling as an act of facilitation of illegal entry performed for financial remuneration, ordinarily penalized as an administrative offense, punishable by a fine. In more severe cases, however, for example if the activity was repeated or if more than five persons were transported, it was classified as a criminal offense, punishable by a fine or up to three years of imprisonment. Since the passing of this initial legislation, the Austrian Parliament has considerably broadened the scope of criminal liability for human smuggling on five separate occasions (see Table 1).

In 1992, criminal liability for human smuggling changed in an important respect. Human smuggling was redefined as "facilitation of the illegal entry or journey through of a foreigner," no longer requiring the element of financial gain necessary in the offense's original defi-

1 Remark on the employed terms: while human smuggling is an expression taken from law, connected with a criminal offense, the term escape assistance is positively connoted.

2 See Constitutional Court 2016: 1; Novella BGBl 190/190, §14 and §14a.

nition. Transport not involving financial remuneration was classified as a punishable administrative offense for the first time, broadening the scope of the legislation. Meanwhile, severity remained the dividing line separating human smuggling as an administrative versus criminal offense. Cases deemed to be "severe" could either be punished as an administrative offense, subject to a higher fine, or classified as a criminal offense, punishable by imprisonment.

In 1996, the scope of human smuggling was further expanded with the introduction of a new classification of "exploitative human smuggling," whereby all instances in which persons were deceived into settling and working in Austria, including in circumstances involving their exploitation or death, became punishable offenses.

In 1997, the offense of human smuggling involving financial gain was shifted to penal law entirely. From this point forward, all cases of human smuggling defined as "facilitation of illegal entry with personal benefit," became punishable by imprisonment or a fine. Further changes included the introduction of greater penalties for human smugglers considered to be "members of a criminal organization," defined broadly as a group of several people mutually involved in the act of escape assistance. Those who organized transport commercially, meaning persons involved in repeated or continuous transport for a certain amount of financial gain accrued over a specific period of time, were to receive higher sentences. Additionally, for the first time, the quality of transport also became an element of the offense, with the introduction of specific penalties for transporting individuals in "torturous conditions"[3] (FrG 1997 §104).

Since 2002, the EU directive defining the facilitation of unauthorized

3 "Torturous" here is being used as an adjective to describe a state involving the infliction of severe pain or discomfort, rather than in reference to the crime of torture, which according to international law, must be carried out by an official and for a specific purpose (e.g. to obtain information).

entry, transit and residence[4] has obliged each Member State to establish appropriate sanctions for those facilitating any illegal entry. The Austrian Parliament implemented the directive in 2005, which included another major expansion of the offense of human smuggling. From that point forward, any conscious facilitation of unauthorized entry, even without financial remuneration or personal gain, became a punishable criminal rather than administrative offense (cf. Constitutional Court, 2016: 4).

Another amendment took place in 2009, when human smuggling was again divided into an administrative and a criminal offense. The crime of human smuggling was defined as the "facilitation of illegal entry of a foreigner for financial remuneration," subject to imprisonment (§114 FPG). Conversely, the administrative offense arose in cases of smuggling without personal benefit. Personal benefit was defined as including not only financial profit, but was understood widely to mean any kind of recompense, from gas money to cigarettes or buying someone a cup of coffee.

In 2014, a decision of the Austrian Supreme Court influenced the development of the offense of human smuggling. According to the court, human smuggling in the sense of §114 PFG (2009) is only punishable in the case of unjust enrichment. In determining what qualifies as "personal benefit," the court ruled that transport provided for an appropriate and reasonable fare does not meet the threshold of "personal benefit" necessary for the offense. In the relevant case, the accused was paid a total of 2000€ for the provision of transportation in the form of two rides from Italy, through Austria and on to Germany for five smuggled persons on the first ride, and nine on the second. The Supreme Court found this price to be reasonable for the service provided, and thus did not find it to constitute "personal benefit" in the sense of un-

4 Directive 2002/90/EC

just enrichment.[5] In 2015, the Supreme court took two other decisions in this regard: While finding two Austrian taxi drivers not-guilty of smuggling due to the missing unjust enrichment,[6] other accused have been found guilty for facilitating illegal entrance, even though they received a comparable benefit.[7] This is due to a distinction of commercial transportation services and private transport. (For further comparison: Schloenhardt 2016b). Following this cornerstone judgment of the Supreme Court, there have been isolated verdicts of not-guilty for accused human smugglers in first instance courts.[8]

In the latest amendment to Austria's human smuggling legislation in 2015, the parliament lowered the threshold regarding the number of smuggled persons necessary for harsher sentencing from five or more to three or more.[9]

In addition, Austria's current legislation on human smuggling does

5 A taxi driver was found guilty by the regional court of Innsbruck of having commercially facilitated the unauthorized entry of more than three persons for financial remuneration, as part of a criminal organization. The taxi driver was convicted for providing transport on two occasions for five and nine persons, respectively. For the two rides, which carried the passengers from Italy, through Austria and on to Germany, the taxi driver earned 2000€ in total. Upon appeal, the Supreme Court ruled that Austria's anti-smuggling legislation only envisages criminal liability in cases involving the illegitimate enrichment of those facilitating unauthorized entry, for instance, if the alleged offender gains remuneration which exceeds the value of the service provided. In the case of the taxi driver, the Supreme Court found that "[t]o obtain an appropriate fare for transport services constitutes, in this case, no illegitimate enrichment." Rather, it noted, only in cases of overpayment, "an intention of illegitimate enrichment can be supposed." As a result, the Supreme Court remanded the case back to the regional court of Innsbruck for a new trial (OGH 2014: 13Os9/14v), in which the court found no evidence of illegitimate enrichment and finally acquitted the taxi driver on all three counts of indictment. https://kurier.at/chronik/oesterreich/schlepperei-mit-angemessenem-fuhrlohn-bleibt-straffrei/150.070.183

6 decision 11 Os 125/15i

7 decision 14 Os 134/15k

8 See Chapter 3.1 for examples of such acquittals. Also important to note is that the same judge of one verdict of not-guilty convicted a person to two years in prison for commercial human smuggling involving the transportation of 24 persons in a sealed, almost airtight van, which nearly caused their death. Some of the smuggled persons had already lost consciousness when the police found them. This decision also accords with the Supreme Court's judgement on the issue of unjust enrichment, which ruled that no form or amount of remuneration could be deemed appropriate for transport in such conditions.

9 For a more detailed presentation, see Constitutional Court (2016:1-6).

not adequately discriminate between transport for commercial reasons and transport for humanitarian reasons or family reunification, despite the clear provision for such a distinction in the *UN Protocol against the Smuggling of Migrants*, which Austria has ratified. Moreover, while the EU *Facilitation Directive* from 2002 explicitly provides the option to introduce such a distinction, Austrian law does not currently allow exemptions for human smuggling carried out for humanitarian reasons or in a humanitarian emergency (Schloenhardt, 2016: 495). The only exemption applies to the facilitation of unauthorized entry of spouses, children or parents, as long as the entry facilitator does not enrich him/herself, or a third person, in the process.[10] Any other humanitarian escape assistance provided to persons outside of this narrowly construed family constellation remains a punishable offense.

Table 1: Development of the offense of human smuggling in Austria[11]

Year	Name and §	Content
1990	Amendment BGBl 190/190, §14 and §14a	Creation of the offense of human smuggling Definition: facilitation of illegal entry for financial benefit Differentiation in administrative offense (fine) and criminal offense (imprisonment) of human smuggling based on severity Criminal offense only in "severe" cases involving: repetition, smuggling of more than five persons (up to one year imprisonment), or commercial smuggling (up to three years imprisonment)
1992	Alien law BGBl 839/1992 §81; §81 FrG	Definition human smuggling: facilitation of illegal entry Continuing differentiation between paid/ unpaid smuggling
1996	§104a StGB	Creation of the offense "exploitative human smuggling" Definition: deceiving someone, for financial remuneration, on the possibilities to settle and work in Austria, or exploiting the person (up to three years imprisonment or, in case of death, up to five years)

10 §120 (9) Alien Police Act.

11 Constitutional Court 2016: 1-6.

1997	Alien law BGBl I 34/2000 §104 FrG	Creation of the offense of "torturous condition" (up to five years imprisonment or, in case of death, up to ten years) Classification of offenses commercial in nature and involving membership in a criminal organization (up to five years imprisonment)
2005	Alien Police Law §114 FPG	Facilitation of illegal entry becomes criminalized also without financial remuneration
2009	Amendment Alien Police Law BGBl I 112/2009 §114; §120 FPG	Facilitation of illegal entry without financial remuneration becomes administrative offense, while facilitation of illegal entry with financial remuneration becomes criminal offense
2013	Novelle BGBl I 144/2013 §114 Abs7 FPG	Addition: Law also becomes applicable for illegal entry facilitation activities carried out abroad
2015	Novelle BGBl I 121/2015 §114 Abs7 FPG	Decrease of the threshold number of smuggled persons for which a higher penalty applies from five to three (subject to a maximum of five years of imprisonment)

2. CURRENT SITUATION

2.1. CURRENT POLITICAL AND JURIDICAL MEASURES TO TACKLE HUMAN SMUGGLING

In 2015, Austria's Ministry of Interior, in collaboration with the Ministry of Justice, adopted a five-point strategy to tackle human trafficking. The strategy calls for intensified controls on international trains coming from Hungary, intensified border controls, a 32-person increase in staff to combat human smuggling, amendments to administrative sanctions on human smuggling, and the introduction of specialized prosecutors in the field of human smuggling (Federal Office of Criminal Investigation, 2016).

Moreover, to proceed with a more concerted effort against human smuggling, the Federal Office of Criminal Investigation opened the Joint Operational Office in May 2016 in Vienna. This office is a branch of the European Migration Smuggling Center (EMSC) of the international police agency *Europol*. If the number of migrants arriving in Europe remains the same as in 2015, *Europol* expects the profits of criminally organized groups engaged in human smuggling to double or triple in 2016. Thus, from their point of view, concrete internationally

coordinated measures are indispensable. The main focus of their investigation is the so-called Balkan Route.[12]

One of the lawyers interviewed for this report suggests understanding Austria's tightening of sentences for human smuggling as an attempt to push back unwanted migration. He stresses that just a few years ago, the level of penalties in human smuggling trials were much lower. Depending on the qualifications and criminal record of the accused, those convicted of human smuggling often received entirely suspended sentences, or sentences that involved serving only the first two to three months of the sentence, with the remaining part to be served on probation. Only rarely were convicted human smugglers imprisoned for their entire sentence. However, when a higher number of migrants started arriving in Austria around mid-2015, decisions became stricter. Gradually, penalties for the same offenses were increased to their current level, often involving a maximum of three years' imprisonment.[13] In this same period, there was only one amendment to the law: the redefinition of the threshold for harsher penalties for human smuggling from five persons to three (paragraph 3). This change alone does not seem sufficient to explain the tightening of sentences.

The Austrian government also introduced an annual upper limit for asylum applications in order to create a mechanism to reject asylum seekers directly at the border. In such a situation, when the yearly limit of 37,500 asylum claims is reached, providing human smuggling services would become even more in demand, as there would no longer be the possibility of claiming asylum at the border.

12 http://www.bmi.gv.at/cms/bk/_news/start.aspx?id=316545503167796C4B4B773D&page=0&view=1. [Last access 10.11.2016].

13 Cf. Interview Mahrer 29.09.2016.

Interventions against the predominant discourse on human smuggling in Austria have been carried out in various spheres, such as justice, politics, art and academia.

Juristic interventions

In 2016, attorney Clemens Lahner, along with other lawyers, filed a submission to Austria's Constitutional Court arguing for the abolishment of the criminal offense of human smuggling, and specifically, requesting an investigation into the constitutional conformity of §114 of the Alien Police Act (FPG). On the one hand, the lawyers argued that the paragraph is too vague, particularly the formulation "facilitation" of unauthorized entry, which they argued does not provide adequate legal certainty to permit those subject to the law to regulate their conduct accordingly. If interpreted broadly, the lawyers argued, nearly all possible interactions with "unauthorized entrants" could fall under this formulation, even the altruistic provision of food and water. They pointed out that the paragraph fails to distinguish between actions driven by humanitarian versus financial motivations, and thus, effectively criminalizes both. Moreover, they argued, terms like "remuneration" and "unjust enrichment" remain imprecise.

The Constitutional Court refused their application, noting that the term "facilitation" is intentionally broad in order to include any action supporting entry and passage of an illegalized foreigner. Regarding the failure to distinguish between humanitarian and financial motivations, the Court affirmed that it is within the scope of legal policy of the Austrian Parliament to govern criminal and administrative law differently.

In February 2014, the *Refugee Movement Vienna*, a political movement founded by refugees fighting against the current asylum system, issued a statement stressing, on the one hand, the impossibility of legally accessing EU-Europe, and on the other, drawing a distinction between "good" and "bad" human smugglers:

> "There is no LEGAL way to reach Europe. (…) That´s why it is impossible to enter Europe without the help of people, whom you call 'smugglers'. Even using smugglers is risky. But it is necessary that someone helps you. Every refugee's story is different. But the common problem is the border. There exist different ways of supporting refugees in crossing borders. Crossing borders needs knowledge, planning and courage. There are different kind of smugglers. You can be cheated, tortured or blackmailed. You have no rights if you go to a smuggler. You cannot ask for special seats like in a plane. But good smugglers are fast, show or lead us a good way, give us shelter and food, know the weather. A good smuggler can neither give you a guarantee for a successful border crossing nor a guarantee for your life. But a good smuggler tries to take care of your life. We would prefer not to be dependent on having a smuggler. But we see it as a service, generally paid, which will exist as long as it is illegal to cross borders." (Refugee Protest Movement, Vienna 2014)

In this statement, the movement stresses the necessity of escape assistance because people's passage is made artificially dangerous by the lack of legal means for travel.

The association *Fluchthilfe & Du?* (Escape Assistance and You?) was founded in solidarity with the refugees accused in the Wiener Neustadt trial (See chapter 2.2.). The group organized campaigns, art installations, and awareness raising events in collaboration with the defend-

ants.[14] Together with *Prozess Report*, an organization focused on trial monitoring and issues of racism, justice and the criminalization of protest, *Fluchthilfe & Du?* published an information leaflet titled "Smash §114" on the paragraph in Austrian law related to human smuggling. In this leaflet, they give a detailed description and analysis of the trial in Wiener Neustadt, along with its underlying laws: "The so-called 'Schlepperei/human smuggling' law has to be seen as a part of the European border regime and, because of its vague formulation, can be used to criminalize every form of support for irregular border crossings. A system in which many persons cannot move 'legally' produces these constructs, like 'human smuggling,' 'marriage for papers,' and 'illegal stay or travelling.' Irregular border crossings are not possible without support, and under these circumstances, 'human smuggling' is a necessary service. As long as there are persons who are forced to or want to cross borders, they will need support for these actions, because the borders are closed to them. And as long as this lasts, there will also be a market for commercial forms of this type of support."[15]

The group *Solidarity Against Repression* was also formed to follow the Wiener Neustadt trial in solidarity with the accused. The group visited the accused in investigative custody, collected money for their lawyers, and created a website with background information on the subject of human smuggling and its criminalization. Regarding §114 of the Alien Police Act, the group Solidarity Against Repression states: "In this concrete case, it is evident that this paragraph is being used as a special instrument of political repression against people resisting the deadly border regime."[16]

14 http://www.fluchthilfe.at/

15 http://no-racism.net/upload/188765932.pdfhttp://no-racism.net/upload/188765932.pdf, p.9 [Last access 12.11.2016].

16 https://solidarityagainstrepression.noblogs.org/%C2%A7114-fpg-the-so-called-schlepperei-paragraph/ [Last access 12.11.2016].

Together, these three organizations - *Fluchthilfe & Du?*, *Prozess Report*, and *Solidarity Against Repression* - played a major role in the formation of civil society interventions to combat the criminalization of human smuggling in Austria. They took on the task of reporting from the Wiener Neustadt court hearing, which was open to the public, and thus, were able to reach a much broader audience than only those able to attend the trial itself.

Art interventions

The Viennese theater *Werk X-Eldorado* performed a piece entitled "Heroes. The women. Three life stories. Many interrogations," produced in cooperation with the Roma theater club *Romano Svato*. The play deals with human smugglers who facilitate the entry of three women into Austria, and was inspired by the "human smuggler" trial against refugee activists in Wiener Neustadt. The play poses the question of whether the "smugglers" are heroes or criminals.[17] In addition to the play, a number of documentary movies discussing the subject have also been produced.[18]

Academic interventions

In addition to some university courses in Vienna that focused on the subject of human smuggling, an international symposium entitled *Schleppen – Schleusen – Helfen* (smuggling – facilitating – helping) took place in Vienna in October 2014. The aim of the conference was to question and unsettle the notions of "human smuggling" and "escape assistance". It also explored how discourses and different meanings associated with escape have changed over time, from a historical perspective. It pointed out how, historically, people providing escape assistance have often been portrayed and celebrated as heroes, while

17 Anderl/Usaty 2016: 50f.

18 For a detailed discussion of art interventions see Anderl/Usaty 2016: 49ff.

today people engaged in similar acts are more often seen as "human smugglers", and subject to imprisonment.

2.3. NUMBERS

According to recent numbers requested by *Asyl in Not* (a partner organization of the project in Austria) from the Ministry of Justice, accusations for human smuggling in 2016 seem to have decreased in comparison to 2015. The number of convictions also appear to have decreased in 2016, as shown in Table 2.

Table 2: Accusations and convictions regarding §114 FPG human smuggling

Accusations	2015	2016 (Jan-Sep)	Convictions	2015	2016 (Jan-Sep)
Total	624	182	Total	841	277
Wien	144	36	Eisenstadt	348	133
Korneuburg	130	26	Korneuburg	155	30
Eisenstadt	64	25	Wien	121	17

Source: Ministry of Justice 2016

The decline seems to correlate with more restrictive controls along the so-called Balkan Route in 2016, and the consequently fewer arrivals of asylum seekers in Austria. Noticeably, the relationship between accusations and convictions differs significantly depending on the regional court. Even though most accusations take place in Vienna, it is also where the fewest convictions can be found. In Eisenstadt, in contrast, the percentage of convictions in relation to accusations indicates restrictive case law. This calculation is somewhat simplified, as it does not take into consideration the number of pending trials from previous years. However, trial monitoring for the same period in Eisenstadt also yielded similar findings, indicating more restrictive case law (see case studies).

The annual human smuggling report published by the Ministry of Interior in 2015[19] recorded an increase of detected persons[20] by 177% compared to 2014, as displayed in Table 3. Regarding these figures, it is important to stress that "detected persons" refers to *alleged*, not proven, illegal entrants, smuggled persons and human smugglers. The number of convictions is significantly smaller than the number of prosecutions, and there are significantly less prosecutions of human smuggling (642) than detections of alleged human smugglers (1,108).[21]

Table 3: Detected persons in relation to § 114 FPG human smuggling

	2014	2015
Detected persons	34,070	94,262
Alleged illegal entry	12,719	20,975
Alleged smuggled person	20,768	72,179
Alleged human smuggler	511	1,108

Source: Federal Office of Criminal Investigation 2016

Regarding the nationalities of the detected alleged human smugglers in Austria in 2015, the report states:

19 In a press release from 2013, Alev Korun, Member of Parliament of the Green Party, criticized the human smuggling report published yearly by the Ministry of Interior. Under the headline "If refugees could legally enter EU territory, enrichment would vanish," Korun stressed the connection between the lack of legal entryways into the EU for asylum seekers with the commercialization of human smuggling. "Also in the presentation of this year's human smuggling report, the Ministry of Interior conceals the true causes and supporters of human smuggling. The closed-border policies of the EU, which are part of the Austrian government's policies, leave asylum seekers facing closed borders. As a result, none of them can enter EU-Europe to seek security without a human smuggler. This, in turn, raises the demand and the profit of human smugglers. Thus the EU's refusal-policy is the true sponsor of commercial human smuggling. (…) If the Minister of Interior, Johanna Mikl-Leitner, really aims to tackle human smuggling as a business, she would need to work on legal avenues for entry instead of refusal. This would make the business of human smuggling disappear." https://www.gruene.at/ots/korun-mit-grenzen-zu-politik-foerdert-man-schlepperei-als-geschaeft

20 All persons who came into contact with authorities for unauthorized entry or stay, either as a smuggled person or alleged smuggler. Most of those people who were detected were found in the districts of Neusiedl/See (11,113), Salzburg (5,178), Bruck/Leitha (5,077) and Innsbruck-country (4,687).

21 Data for the year 2015.

Table 4: Nationalities of the detected alleged human smugglers and alleged smuggled persons in 2015

Nationality of alleged human smuggler	Nationality of alleged smuggled person
190 Serbia	21,473 Syria
141 Romania	20,391 Afghanistan
139 Hungary	12,732 Iraq
74 Kosovo	2,656 Iran
62 Syria	2,633 Pakistan

Source: Federal Office of Criminal Investigation 2016

According to data from Austria's Ministry of Justice, the number of arrests for human smuggling increased sharply between July and October 2015. While in the beginning of July, 174 persons were held in investigative custody awaiting trials for human smuggling, the number rose to 210 in August and 397 in October.[22] As of October 2015, one in five people held in investigative custody in Austria were suspected of human smuggling.

3. CASE STUDIES

In the course of the project *Controversies in European Migration Policies – Granting Protection vs. Border Control*, ten trials on §114 FPG (human smuggling) with 17 accused in total have been monitored at different regional courts[23] throughout Austria. Additionally, media reports on trials and verdicts have been reviewed. Based on this monitoring, four trial categories can be distinguished that show certain regularities: (1) "torturous condition" of the transported persons; (2) commercial nature and criminal organization; (3) humanitarian motives; and (4) ver-

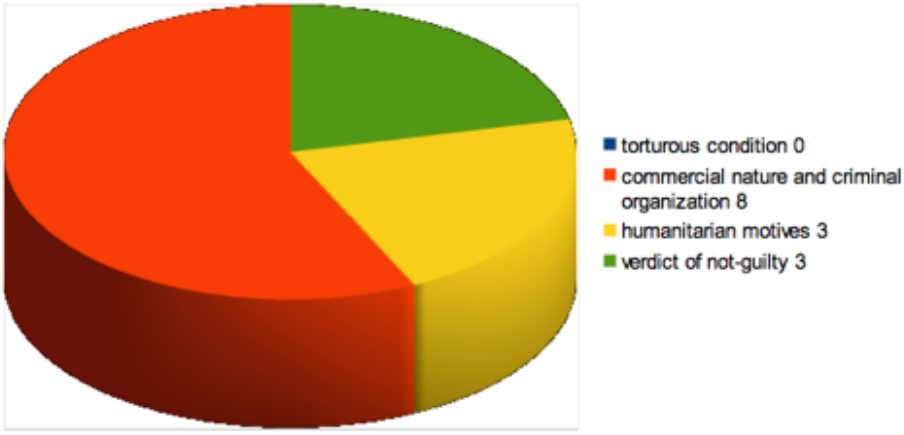
22 derstandard.at/2000023354047/Jeder-fuenfte-U-Haeftling-ist-Schlepperei-Verdaechtiger. [Last access 09.11.2016].

23 Monitoring was done in the following regional courts: Wien, Eisenstadt, Klagenfurt, Innsbruck

dict of not-guilty.

The decision of the Supreme Court that transport provided for an appropriate fare should remain without sentence, seems to be unequally applied across different regional courts, as witnessed during trial monitoring process. In Vienna, according to verbal information given by the Court President to the organization *Fluchthilfe & Du?*, four judges are designated specifically to human smuggling trials and have been specially trained with regard to the Supreme Court decision. However, in Eisenstadt, it seems that the Supreme Court decisions hardly influences the trials, though this impression requires further investigation for substantiation. The distribution of trial categories by percent draws the following picture:

Graphic 1: Monitored Trials:
Distribution of trial categories by percentage



The trial categories presented below support the current analysis by indicating the scope and different configurations of the trials monitored over the course of the project. From the numerous trials on human smuggling, the categories illustrate that there is not only *one* type of "human smuggler," but rather a variety of frameworks for crimi-

nalization. Differentiation can not only be made between un/paid escape assistance, but also regarding the quality of the transport provided and the safe arrival in the country of destination. Below, all of the four category-cases will be described in more detail on the basis of trial observations.

3.1. "TORTUROUS CONDITION" OF SMUGGLED PERSONS, REGIONAL COURT EISENSTADT, 09.11.2016:

As there were no trials among those monitored that fit this category, the description below quotes coverage of an exemplary case in an article published by the Austrian Press Agency (APA):

> Because he smuggled 50 people in torturous conditions in a van to Austria, a Bulgarian citizen has been sentenced to four years of imprisonment. The transport took place on July 25, 2015, one month before the 71 dead bodies of refugees were found in Parndorf. One of the men held responsible for this tragedy, is supposed to be the accomplice of the defendant. For a long period of the jury-trial, the 51-year-old man (…) disputed having been the driver of the smuggling vehicle. He [claimed that he] only entered the vehicle on the highway bridge in Budapest, because he was promised a job in Austria. In return, he would pay 500€ as provision to the driver. "I plead guilty of being in the car, sitting beside the driver on the passenger seat," the accused stated. Even though he asked the driver to stop, this only happened in Austria, due to a breakdown of the engine. After the car stopped, he saw people "that were not in a good state." He gave them water, an energy drink and his sandwich. Some of the persons fell on him when he opened the side door of the van. "The doors had been covered with rubber which had been torn down by the people inside to let more air come in," states the accused, who then hitchhiked back to Hungary. "I find his story outlandish," commented the judge. "White vans were the

> classic vehicles for human smuggling of a large number of people." The smuggled persons entered the van in a forest. His version would be "remote from everyday life."
>
> One of the smuggled persons explained via video conference what happened on the way from the Serbian-Hungarian border to Austria. (…) In a forest in Hungary, the accused had picked up the group in order to bring them to Germany. "There was one passenger, they were two," remembered the witness, who, together with a second attester, identified the accused as the driver of the smuggling vehicle. "We knocked on the walls, because it was very hot inside and we could not breathe," explained the 49-year-old man. Then the vehicle stopped and they got six bottles of water. Inside the luggage space of the car it was very dark. "There was no air supply. My little daughter lost consciousness. We were all afraid we would suffocate."[24]

Towards the end of the trial, the accused admitted his responsibility and issued a confession. As a result, the court found him guilty and the decision remains in effect.

3.2. COMMERCIAL NATURE AND CRIMINAL ORGANIZATION, REGIONAL COURT EISENSTADT, 31.08.2016:

The accused[25] in question was prosecuted for human smuggling according to § 114 of the Alien Police Act.[26] According to the charges brought by the prosecution, a total of 52 persons were illegally trans-

24 "Schlepperprozess in Eisenstadt." (9.11.2016) Austrian Press Agency (APA): derstandard.at/2000047233886/Schlepperprozess-in-Eisenstadt-50-Menschen-in-Kastenwagen-gepfercht. [Last access 10.11.2016].

25 The trial involved two defendants, but the following description focuses only on the case of the second person accused.

26 §114 (3) first and second case Alien Police Act (FPG).

ported on two trips from Hungary to Austria, and on one trip from Austria to Germany. The defendant, a Romanian citizen, was accused of being part of a criminal organization. He supposedly joined the other alleged offenders in renting the transportation vehicles in Vienna, and then acted as a driver in a vehicle ahead of the actual smuggling cars for each of the three trips. These actions took place during the period from 1 to 13 August 2015. The prosecutor accused the defendant of receiving at least 1400€ in remuneration (350€ each for the first two transports and 700€ for the third). The accused pleaded "not guilty."

The prosecution's argument was largely based on the testimony of Witness A, who confessed and was imprisoned for human smuggling. When asked, the witness indicated that the defendant had "nothing to do with all this," saying that he had only helped out during the first trip, since he, the witness, did not know the route. During the following trips, Witness A reported that the accused did not participate.

In the course of the hearing, another witness, Witness B, who was the director of the company who rented the van to the alleged human smuggler, stated that there had been several rental agreements between his company and Witness A, who was the renter of the car, while he identified the accused as the responsible driver.

The prosecutor applied for conviction following the charge, arguing that the accused's sentence should be less than that of the alleged boss of the criminal organization, but higher than witness A's, who had confessed and received two years' imprisonment.

The lawyer of the defendant maintains that his client was not involved in human smuggling. The defense lawyer argued that the accusations were solely based on the contradictory testimonies of Witness A, who had been offered a deal by the police to incriminate other persons in exchange for a reduction in his sentence. The written protocol of Wit-

ness A's testimony showed clear signs that someone, possibly the police, added details to it after-the-fact. According to the lawyer, since mid-2015, a development in the jurisprudence has become predominant whereby even those providing transportation that preserves the physical and mental well-being of the smuggled persons, receive sentences involving imprisonment without probation. The quality of the human smuggling does not seem to matter, even if no payment was exchanged for the transport. Instead, the court always hands down sentences in accordance with the worst conditions possible.

The court found the defendant guilty of the charges and sentenced him to three years' imprisonment. In determining the degree of penalty to be applied, the judge followed the prosecutor's suggestion concerning the degree of the sentence, and took into consideration the convict's existing criminal record, the number of persons smuggled, and his denial of the charges. However, in contrast to most human smuggling cases, the decision has yet to be enforced, as the defendant appealed, seeking dismissal on procedural grounds.

In two out of three transports involved in this case, the identities of the alleged smuggled persons remain unknown. Hence, whether they were citizens of the EU with the right to travel or nationals of non-EU states with valid travel documents or not, also remains unknown. The longer period of time, which is a defining criterion of the concept of criminal organization, refers, according to the argument of the prosecutor, to a time interval of 13 days, from 1.8.-13.8.2015. This illustrates the low threshold of the court in qualifying social and economic ties as constituting a criminal network in relation to "human smuggling." Moreover, the court accepted that a figure of 1400€ was paid for the entire journey, but failed to consider the distance this sum was paid to cover in order to determine whether the amount constituted a fair price or a case of unjust enrichment. Instead, financial benefit on behalf of the accused was simply presumed, even though a determination of

whether the transport fare might have been appropriate could have potentially exempted the accused from punishment.

3.3. HUMANITARIAN MOTIVES, REGIONAL COURT INNSBRUCK, 11.07.2016

The accused in this case is a refugee from Egypt who obtained legal residency in Austria.[27] In order to reunite with his nuclear family – his wife and four children – in Austria, he purchased false documents for them. As a result, he was accused for the attempt of human smuggling[28] and the falsification of legal documents.[29] He ordered the fake Syrian documents for his wife and children because Austrian law requires proof of nationality for purposes of family reunification. Since the accused wrongly indicated Syrian instead of Egyptian nationality during the asylum process, he needed documents to prove the Syrian identity of his family as well. In total, he paid 600€ for the counterfeit papers.

The prosecutor admitted that this was a case of attempted human smuggling with a human face, and acknowledged that it surely differs from usual human smuggling trials. The accused had tried to reunite with his family, from whom he was separated, by bringing them to Austria. Yet, by ordering the false documents, he facilitated the unauthorized entry of his family. According to the prosecutor, this caused the enrichment of a third party.[30] While the actions of the accused were

27 The second point of the demand for penalty (falsification of documents) concerns documents which were provided by the accused to claim asylum. This point is not part of the monitoring protocol.

28 § 114 paragr. 1, paragr. 3 l. 2Alien Police Act, § 15 StGB.

29 §§ 223 paragr. 2 StGB.

30 The prosecution argued that the payment of 600€ did not accord with the Supreme Court ruling, which established that appropriate remuneration remains exempt from punishment. In line with the Supreme Court's decision, private persons can only be paid for the actual costs accrued for the services or material they provide, such as reasonable transport charges and the cost of fuel. Since the person issuing the false documents was not legally entitled to do so, he could only charge material costs, like paper and printing, but could not charge for stamp duty. Doing so, in this particular case, constituted unjust enrichment of a third person.

understandable, the prosecutor noted, they were nonetheless against the law. Thus, the prosecutor demanded an appropriate, but humane sentence.
In contrast, the lawyer of the accused insisted that the defendant's situation should not be considered human smuggling because the defendant had no intent to enrich a third party. His client possibly would have been accepted as a refugee even without the fraudulent Syrian identity, because he had been verifiably persecuted and imprisoned in Egypt for being a member of the *Muslim Brotherhood*. Additionally, the lawyer mentioned as an extenuating circumstance that his client had no criminal record and that he was simply missing his family. He pleaded innocent.

The court found the accused guilty and sentenced him to a five-month suspended prison sentence and three years' probation. Additionally, he was ordered to pay a fine of 960€ as well as the trial costs, or, alternatively, he could choose imprisonment for 120 days.

The judge mentioned having considered the circumstances regarding the degree of penalty. She recognized the humanitarian motives of the offense. Additionally, the accused did not have any criminal record. Yet, the offense of human smuggling was committed because of the facilitation of the illegal entry of his family and the enrichment of a third person through the payment of 600€. This case illustrates how the humanitarian motives of the family's father were outweighed by the court's desire to set a preventive precedent by sanctioning his conduct as a clear breach of the law. The verdict in this case has been upheld.

3.4. VERDICT OF NOT-GUILTY: APPROPRIATE TRANSPORT FARE, REGIONAL COURT VIENNA, 22.1.2016:

The accused in this case, a Hungarian citizen, transported two persons from Budapest to Vienna, for which he received remuneration of 1100€.

A friend of his transported the two persons further, from Vienna to Brussels, and gained a portion of the financial remuneration originally paid to the accused, amounting to 600€. In total, the refugees paid 1100€ for the entire trip from Budapest to Brussels.

In line with the judgment of the Supreme Court regarding appropriate remuneration, the judge found the accused not guilty. The judge determined the transportation fee of 1100€ to be a reasonable price, if not a low fare, for the transportation provided, given that taxi drivers typically charge a rate of one Euro per kilometer (see above), and the total outbound and inbound journeys under investigation comprised a total of 2400 km.

4. ANALYSIS

To sum up, it is possible to identify two contrasting tendencies regarding the development of "human smuggling" as a legal offense in the Austrian context since 1990. On the one hand, Austrian courts and the parliament seem to be working together symbiotically to stem illegalized migration by broadening the scope of escape assistance qualified as a crime. This, in turn, affects all attempts to facilitate the entry of people without valid residence authorization or a visa, even when such acts are motivated by humanitarian intent. Further investigation is required to find out whether the application and interpretation of the law by judges has led to an increase in the rate of convictions and/or severity in sentencing, even without amendments to the law. As demonstrated from trial monitoring, Austrian judges have yet to address the absence of legal alternatives for entry into the EU territory, a fact that actually produces illegalized migrants and "human smugglers."

On the other hand, the criminalization of the facilitation of entry has also become legally contestable due to the cornerstone decisions of the

Austrian Supreme Court on the issue of "human smuggling" in 2014 and 2015. Thus, even though the criminalization of escape assistance has expanded in Austria on the whole, isolated victories (not-guilty verdicts) have been won in regional courts, based on the Supreme Court judgment whereby persons who transport unauthorized individuals in a vehicle across borders for an appropriate fare, rather than "unjust enrichment," are discharged. As this demonstrates, the Supreme Court decisions may have the potential, in cases where the accused has access to qualified defense, to contribute to the decriminalization of paid escape assistance.

Concerning the trial monitoring, four basic categories of court processes were observed. First, verdicts ruling that smuggled persons were put in a "torturous condition" often resulted in penalties of up to ten years' imprisonment. Second, the majority of the trials monitored involved investigation into the "commercial nature" and "criminal organization" aspects of human smuggling/escape assistance. From the perspective of the court, whoever repeatedly engages in transporting persons and, from this, earns a continuous income of a certain amount over a specified period of time, is usually punished with imprisonment. The monitoring shows that, in general, the court applies a low threshold when qualifying social and economic ties as constituting "criminal networks." Even in cases lacking enough information to determine whether the fare charged for transport could be considered appropriate, judges have ruled against defendants, demonstrating a tendency to penalize any form of financial gain, regardless of whether it constitutes "unjust enrichment." Third, humanitarian motives for facilitating unauthorized entry are often only counted as mitigating circumstances, for example in cases involving family members. Fourth, most cases in which smuggled persons are found not guilty rest on legal argumentation related the use of appropriate vehicles and reasonable transport fares, or are dismissed on the basis of formal defects.

Despite frequent ambiguities in "human smuggling" cases, particularly regarding the identity and number of alleged smuggled persons, the majority of decisions are not appealed.

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4. COUNTRY REPORT GERMANY

by Tiziana Calandrino (borderline-europe)

Prevailing political and media discourse in Germany rarely differentiates between different types of "human smuggling." In newspapers and policy documents, escape assistance in the form of facilitating border crossings is usually portrayed in a negative light, frequently described as a transnational organized crime driven by profit motives and often involving the physical violation and exploitation of migrants. There is no doubt that there are individuals and groups who abuse migrants, trap them in situations of dependence, and force them onto boats or other means of transport. However, this country report attempts to expand understandings of "human smuggling" beyond this limited perspective. The report traces the discursive development of "human smuggling" in Germany since the 1990s, when the country faced its first so called "refugee crisis" and German politicians started to intensify the criminalization of illegalized migration and escape aid. It examines this development from a legal, political and historical perspective, and analyzes specific portions of the German Residence Act concerning "illegal entry" and facilitation in comparison to the *UN Smuggling of Migrants Protocol* and the European *Facilitators' Package*. It then provides an overview of current political strategies to combat "human smuggling" in Germany and concludes with three case studies on persons who became facilitators to illegalized entry and how they were subsequently criminalized under German law.

1. HISTORICAL LEGAL AND DISCURSIVE BACKGROUND

Escape facilitation has probably existed since the introduction of borders (Karakayali, 2008: 230). As long as there are people in need of protection, they will try to enter safe territory. Likewise, as long as people face obstructions in trying to enter safe territory, there will be those people who are willing to help them do so. The very existence of bor-

ders as militarized and securitized regimes creates both the necessity and demand for facilitation in crossing them. As Didier Fassin has observed, questions concerning immigration, borders, their controls and general perspectives on the "other" tend to occur in cyclic conjunctures (2011: 215f). Whether the facilitation of border crossings is considered escape assistance or "human smuggling" depends on how the public views immigration in a particular cycle.

As an historical example, the facilitation of escape from Germany to other countries was criminalized during World War II. However, after the downfall of the Nazi regime and during the period of accounting for this time, the German public reevaluated its opinion of escape aid as a "crime," rehabilitating both the legal status of escape assistance and the reputational standing of several prominent escape facilitators (Anderl/Usaty, 2016: 19). Later, during the Cold War, the Federal German Republic legally endorsed the facilitation of escape for those fleeing from the German Democratic Republic (DDR), while public opinion often saw it as a heroic act – of course only from the Western perspective. People who supplied escape assistance as a commercialized service, a practice that is often denounced today, were called "escape helpers" (Fluchthelfer) and awarded the Federal Cross of Merit (Bundesverdienstkreuz) (Stiegler, 2014: 12). In a case that occurred in 1977, the Federal Supreme Court (Bundesgerichtshof) ruled that a DDR-refugee was obliged to pay the agreed-upon remuneration of 30,000 DM to his escape facilitator, as the court found the amount to be an appropriate sum for the services provided in connection with the border crossing process (Stiegler, 2014: 12; Neske, 2007: 24). This incident shows that even commercialized escape facilitation, which is frequently condemned today as a form of financial exploitation, was not only legal, but also seen as legitimate in the eyes of the public and courts.

A turning point occurred in German migration politics in the 1990s

that led to the development of a different image of escape facilitation as "human smuggling." The end of the Cold War and the several wars in Southeast Europe and other parts of the world caused an increase in immigration to Germany. At the time, Poland and the Czech Republic were not yet part of the Schengen Area or the European Union. As a result, many migrants sought to cross the Polish and Czech borders with Germany in order to access Europe's Schengen Area. Germany was both a country of destination as well as transit during this first so-called "refugee crisis" in the Schengen Area, spurring public debate within the country about Germany's migration and asylum policies. The increasing immigration to Germany was framed as a political problem in need of political solutions. At the time, the debate differentiated between "good" asylum seekers, who were perceived to be in "real" need of international protection, and "bad" asylum seekers, who were seen to be abusing the asylum system to improve their individual living conditions.

In response to the debate, Germany's Constitutional Law was amended in 1993 to restrict entry opportunities for asylum seekers by introducing the concept of "safe third states" and "safe states of origin"[1] (Cremer, 2013: 7). Even though the new asylum regulations reduced the number of people who were entitled to seek asylum in Germany, they did not stop people from coming. The new regulations merely rendered them "illegal." The rising number of "illegal" migrants, in turn, led to new political initiatives calling to curb "illegal" migration. In this context, the discourse around facilitating entry changed dra-

1 Section §16a of Germany's Constitutional Law was changed. The concept of "safe third states" refers to the practice whereby asylum seekers should apply for asylum in the country in which they arrived first, and which is, according to the *Geneva Convention*, a country capable of providing international protection. The concept of "safe states of origin," refers to the practice whereby the German legislature can evaluate the political and legal situation in a country in order to deem it "safe," meaning it can be excluded from general persecution assessments in asylum determinations. As a result, asylum seekers coming from so-called "safe states of origin" must prove that they have been personally persecuted in order to apply for asylum in Germany.

matically. Facilitating escape became increasingly referred to as "human smuggling," a term with negative connotations, and was often denounced in public and political discourse as a form of transnational organized crime linked with financial and physical exploitation (van Liempt, 2016: 3). The fact that "human smuggling" as defined in international law does not necessarily imply exploitation or the violation of migrants' rights has, so far, had little influence on the term's understanding in public debate (see Chapter 3.1). The illegalization of immigration propelled the phenomenon of "human smuggling" onto the German political agenda. As can be seen at different stages in German history, discourses around facilitating illegalized entry into Germany often change in reaction to political and legal developments.

The following section describes the development of "smuggling of migrants" as an offense in German law and gives an overview of juridical measures that criminalize those who facilitate migrants' entry/stay in Germany. It also discusses the incorporation of international and EU-European legal frameworks within German legislation.

2. DEVELOPMENT OF THE OFFENCE OF HUMAN SMUGGLING

Before the 1990s, the offences of "illegal migration" and "smuggling of migrants" did not play a prominent role in public discourse or law in Germany. Prior to this period, the "illegal entry" of persons into German national territory was criminalized initially in the 1952 German Passport Act (Deutsches Passgesetz) and, subsequently, in Section 47 of the 1965 Aliens Act (Neske, 2007: 24). In 1990, the German government revised the Aliens Act of 1965, particularly with regards to sentencing. The offences concerning illegal entry into Germany were divided into: 1) the offence of unauthorized entry, 2) unauthorized residence, and 3) "smuggling of migrants." Section 92 of the updated Aliens Act defined

the penal provisions for the respective offences, while Section 93[2] outlined the applicable fines (ibid.).

The "refugee crisis" of the 1990s inaugurated further restrictions in German migration legislation. In addition to the 1993 constitutional regulations, which narrowed permissions and greatly limited options for seeking asylum, another reform was implemented concerning the illegalization of migration. In 1994, the Law for the Suppression of Crime (Verbrechensbekämpfungsgesetz) came into force, providing mechanisms to combat organized crime and politically motivated crime, as well as widening the surveillance powers of the German Intelligence Agency (Bundesnachrichtendienst (BND)). The implementation of this law affected several other areas of law, including the Penal Code, the Code of Criminal Procedure, the Aliens Act and the Asylum Law. As regards to the creation of the offence of "human smuggling," the changes to the Aliens Act at this time were significant. The former Section 92 of the Aliens Act, which regulated the elements of the offence of "smuggling of migrants," was divided into §92a "smuggling of migrants" and §92b "commercial and organized smuggling" ("gewerbsmäßiges und organisiertes Schlepperwesen") (ibid.). With the implementation of the Law for Suppression of Crime, the facilitation of unauthorized entry became legally linked to organized crime (Karakayali, 2008: 231).

In 2002, the European Union developed regulations concerning the criminalization of facilitating "illegal entry" into European Member States. The so-called *Facilitators' Package* obliged all Member States to implement certain European standards into their national legislation. As German law already fulfilled the European standards by criminalizing the facilitation of entry, in some instances more strictly than the European legal provisions, the implementation of the *Facilitators' Pack-*

2 https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27bgbl190s1354.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl190s1354.pdf%27%5D__1485516846291. [Last access 27.01.2017].

age was easily accomplished on 4 December 2004 (Neske, 2007: 36).

In 2005, another reform of the Aliens Act occurred. In addition, the Residence Act[3] was passed to further regulate and limit immigration and determine rules for residence and integration of EU-citizens and foreigners in Germany. Particularly relevant to the offence of "illegal entry" or "human smuggling" were sections §95[4], §96[5] and §97[6] of the Residence Act (AufenthG). Section 95 defined the elements of punishment for the offence of "illegal entry" (Illegale Einreise §95 AufenthG), serving as a precondition for the offense of "human smuggling," which was described in Section 96 on the "smuggling of foreigners" (Einschleusen von Ausländern §96 AufenthG). Section 97 defined aggravations of the smuggling offence, such as smuggling with lethal consequences and/or commercial and organized smuggling (Einschleusen mit Todesfolge; gewerbs- und bandenmäßiges Einschleusen §97 AufenthG).

2.1. §95 OF THE RESIDENCE ACT: THE JUSTIFICATION OF THE "SMUGGLING OFFENCE"

As mentioned above, the criminalization of facilitating "illegal entry" in §96 of the Residence Act, was connected to the offence of "illegal entry" itself (§95 of the Residence Act). According to §95 of the Residence Act, "illegal entry" and "illegal stay" in German territory is considered

3 Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern.

4 §95 AufenthG, Juris GmbH. Juristisches Informationszentrum für die BRD https://www.gesetze-im-internet.de/aufenthg_2004/__95.html. [Last access 22.01.2017].

5 §96 AufenthG. Juris GmbH. Juristisches Informationszentrum für die BRD https://www.gesetze-im-internet.de/aufenthg_2004/__96.html. [Last access 27.01.2017]. Since February 2016 the minimum custodial sentence is three months, before, it was six months: http://www.spdfraktion.de/themen/beschlossene-massnahmen-fluechtlingspolitik. [Last access 27.01.2017].

6 §97 AufenthG. Juris GmbH. Juristisches Informationszentrum für die BRD https://www.gesetze-im-internet.de/aufenthg_2004/__97.html. [Last access 27.01.2017].

a crime. Article 1 regulates penal provisions for "illegal stay" and Article 2 regulates penal provisions for "illegal entry." Meanwhile, Section 96 of the Residence Act defines a smuggler as a person "who incites, or assists in the actions described in §95, Article 1, Paragraphs 1, 2 or 3 and Article 2 (Neske, 2007: 27). Hence, §96 of the Residence Act refers to the actions in §95. Any other assistance given to the offense of "illegal entry" or an "illegal stay"[7] that is not described in §96 is criminalized with §27 of the Penal Code (Strafgesetzbuch StGB), which criminalizes any assisting of a criminal act. As a paragraph criminalizing the assisting of criminal actions already existed in the German Penal Code, the creation of the additional offense in §96 of the Residence Act was surprising. The reason for the creation of the additional offense is perhaps due to the fact that the German legislature considers "smuggling" actions to be "socially damaging," as shown in a quote from a verdict of the Federal Supreme Court in 1999:

> [...] it is not the intention of an alien to enter illegally, but it is the intention of the smugglers to abuse the lack of knowledge and the economic emergency situation of migrants to gain personal and financial profit out of their situation. Being in a vulnerable situation, migrants easily become victims of the smugglers. This circumstance requires a new offense, which complies with the injustice of the smuggling action. According to the Law of Suppressing Crime of 28 October 1994, the actions of smugglers are reprehensible and socially damaging [...]. (own translation of Neske, 2007: 26).

According to this quote, the existence of "illegal entry" as an offense is puzzling, as it suggests that migrants do not intend to enter illegally. Rather, it strengthens the generalized image of "smugglers" as those who incite and are thus responsible for the "illegal entry" of migrants. According to the argument advanced in the verdict above, without

7 See footnote 3 for further details concerning the legal text of §95.

"smuggling," there would be no "illegal entry" of migrants. The ruling justifies the creation of an additional offense to allow for harsher punishments for smugglers. From another perspective, the creation of an additional offence also serves to dissuade illegalized migration in general.

Another exemption, which leads to the harsher criminalization of facilitating "illegal stay/entry", is connected to the offense of "illegal entry" in §95 of the Residence Act. While the offence of "illegal entry" may no longer be applied once a person has filed for asylum in Germany in accordance with the *Geneva Convention*[8], those who facilitated the "illegal entry" of the asylum seeker are still subject to prosecution in accordance with a 1999 ruling of the German Federal Supreme Court (Neske, 2007: 29).

2.2. SECTIONS §96 AND §97 OF THE RESIDENCE ACT

According to the "smuggling" offense in Section 96 of the Residence Act, the incitement and assisting of "illegal stay" and "illegal entry" are considered a crime. The crime of "smuggling" consists of the intentional action and either one or more of the following: 1) a financial or personal benefit which was promised and/or received; 2) the repeated incitement or assisting of "illegal stay/entry;" and/or 3) the assistance of illegal entry of at least two people (ibid.: 30). The sentences vary from a minimum of three months' imprisonment and a financial penalty, to a maximum of five years' imprisonment.

Article 2 of §96 of the Residence Act defines aggravated forms of the smuggling offense. A minimum of six months and a maximum of ten years' imprisonment is prescribed for anyone who "smuggles" com-

8 Article 31, *Convention and Protocol relating to the Status of Refugees*, see http://www.unhcr.de/fileadmin/unhcr_data/pdfs/allgemein/GFK_Pocket_final.pdf. [Last access 05.04.2017].

mercially and/or as part of a criminal organization. Attempted smuggling is also penalized (ibid.).

Section 97 of the Residence Act defines the aggravated offense of smuggling with lethal consequences and/or commercial and organized smuggling. Article 1 of §97 of the Residence Act defines smuggling with lethal consequences as punishable with a minimum custodial sentence of three years. Article 2 defines the combination of commercialized and organized smuggling as a major offense with a minimum sentence of one year's imprisonment (ibid.: 34)

The German legal framework therefore has strong measures in place to criminalize any form of facilitating "illegal entry," be it through assisting or smuggling migrants. Accordingly, German law and jurisprudence heavily dissuade "illegal stay/entry" and any facilitation of it.

2.3. A COMPARATIVE ANALYSIS OF INTERNATIONAL, EU-EUROPEAN AND GERMAN NATIONAL LAW

As already covered in Chapter 3.1 of this report, international and regional legal frameworks also address the issue of "human smuggling," including the *UN Protocol against the Smuggling of Migrants* and the European *Facilitators' Package*. Both instruments supply standards to criminalize the facilitation of "illegal stay/entry" and oblige their signatory states to implement these standards via incorporation into national legislation. The *UN Protocol against the Smuggling of Migrants* and the European *Facilitators' Package* differ from each other concerning modes of criminalizing aspects of financial gain, humanitarian aid and the non-criminalization of the smuggled persons. As Germany is a signatory of the *UN Protocol against the Smuggling of Migrants* as well as an EU Member State, the following comparative analysis highlights the interaction of the two legal frameworks as incorporated into German national legislation.

The *UN Protocol against the Smuggling of Migrants* defines the term "smuggling" as a practice that takes place when a financial or other material benefit is intended. In the European *Facilitators' Directive*, in contrast, any form of facilitation of "illegal stay/entry" is criminalized, even if no financial gain is intended. German law, in turn, considers financial gain as one of four potential elements comprising the offense of "smuggling." It also widens the definition of "benefit" as mentioned in the UN Protocol, to include any personal benefit, leaving space for a wide scope of interpretation.

The UN Protocol prescribes that facilitation or assistance of "illegal entry/stay" as a form of humanitarian aid should not be criminalized, while the European *Facilitators' Package* leaves this aspect to the discretion of the Member States. Meanwhile, German law does not address the issue at all. Instead, German law prescribes a blanket ban on all forms of escape assistance, be it facilitation of "illegal entry/stay" or the commercialized and organized "smuggling of migrants" for financial gain.

The UN Protocol maintains that the smuggled persons themselves should not be criminalized. Meanwhile, the European *Facilitators' Package*, following the *Geneva Convention*, prescribes that successful asylum recipients may avoid liability for the offense of "illegal entry," a provision that extends even to those refugees who were "smuggled" or otherwise used assistance to enter. In general, the European *Facilitators' Package* gives neither a mandate nor justification for the criminalization of migrants who have been smuggled (Schloenhardt, 2015: 97). In German law, the same reference to the *Geneva Convention* exists concerning the offense of "illegal entry." However, German law differs in that it specifies that all entry facilitators, even of successful asylum applicants, can be held criminally liable for their actions, even if the "illegal entry" does not constitute a crime for the one who entered. In this way, German law mirrors the European legal framework by not

giving concrete guidance on whether or not smuggled persons should be criminalized, but is more specific regarding the criminal liability of "smugglers" and any others facilitating entry. Compared to both the *UN Protocol against the Smuggling of Migrants* and the European *Facilitator's Package*, German law is more restrictive in that it includes more measures to criminalize the facilitation of "illegal entry."

3. CURRENT POLITICAL AND JURIDICAL MEASURES AGAINST HUMAN SMUGGLING

At the operational level, Germany has adopted several national, European and international strategies for combating undocumented entry and its facilitation. These efforts to manage illegalized migration are carried out in line with other measures to combat organized crime, terrorism, the trafficking of human beings, and drug smuggling, and often use equivalent security tools and mechanisms (Buchen, 2014: 14f). To combat "illegal entry" facilitation, the German Federal Police Force (Bundespolizei) observes and controls Germany's external Schengen borders.[9] In doing so, Germany's Federal Police Force collaborates with different police departments across the country, as well as in border zones.

In 2006, the German government founded the Common Analysis and Strategy Center on Illegal Migration (*Gemeinsames Analyse- und Strategiezentrum illegale Migration* (*GASIM*)). The *GASIM* collaborates with the Federal Police Force (Bundespolizei), which is also responsible for the Border Guard (by land, air and sea), as well as with the Federal Criminal Police Office (Bundeskriminalamt), the Federal Intelligence Service (Bundesnachrichtendienst), the Federal Office of Migration and Refugees (BAMF), the Federal Office for the Protection of the State

9 http://www.bmi.bund.de/DE/Themen/Sicherheit/Illegale-Einreise/Illegale-Einreise/illegale-einreise_node.html. [Last access 21.01.2017].

(Bundesamt für Verfassung), the Federal Customs Administration (Bundeszollamt) and the Federal Foreign Office (Auswärtiges Amt). The Center collects and analyzes all data generated by its partners, which it uses to formulate and revise strategies for combatting human smuggling and the facilitation of illegal entry / stay (ibid.). Additionally, the *Common Centre against Terrorism* (Gemeinsames Terrorabwehrzentrum (*GTAZ)*, founded in 2004, also cooperates with approximately 40 German institutions, and is additionally partly engaged in researching routes and plans of so-called "smugglers." It therefore plays a role in German efforts to combat "human smuggling" (Buchen, 2014: 17).

On a European and international level, Germany sends out members from its Federal Police Force to so-called "countries of origin and transit" to support *Frontex*[10]-Operations. It also collaborates with inter-state justice and policing bodies, such as *Eurojust*, *Europol* and *Interpol*, during investigative proceedings.[11]

Ever since the boat accident in which approximately 900 migrants lost their lives during the crossing from Libya to Italy in April 2015, "smugglers" have been widely blamed for the tragic death toll among migrants trying to reach European shores. European politicians and media pundits discussed the incident intensely, giving several statements in support of the fight against "smugglers" who, in their eyes, bear culpability for the numerous deaths that occur during informal boat crossings. After the incident, the European Union created a T*en Points Action Plan* defining different measures to combat the smuggling of migrants. The *Ten Points Action Plan* announced the launch of the military mission *EUNAVFOR MED*, whose declared aim is to identify vessels

10 *Frontex – European Border and Coast Guard Agency* is a private agency, hired by the European Union and focuses on the EUropean border control. See Chapter 3.3 of this report for further information.

11 http://www.bmi.bund.de/DE/Themen/Sicherheit/Illegale-Einreise/Illegale-Einreise/illegale-einreise_node.html. [Last access 21.01.2017].

and routes of "smuggling rings"[12] on the Mediterranean Sea. Since the military mission officially began in June 2015, the German military has contributed two vessels (the frigate *Schleswig-Holstein* and the supply vessel *Werra*, on rotation) and 950 soldiers for the first and second period of the operation, as decided by the Ministry of Foreign Affairs (DBR 18/6013; DBR 18/8878).

Another turning point for German political strategies to combat the facilitation of illegalized entry occurred in 2015, with the so-called *Summer of Migration*[13] (Kasparek/Speer, 2015), when numerous people, mostly from Syria, Iraq, Eritrea and Somalia, tried to enter Europe. As Europe's external border countries like Hungary, Macedonia and Serbia did not want to deal with the large number of arrivals, they turned a blind eye and allowed their informal transit to Austria and Germany. In August 2015, Germany also suspended the Dublin System briefly for a couple of months by allowing Syrian citizens to come to Germany. Based on an agreement with Austria, migrants were allowed to transit Austria to reach Germany during the last two weeks of August. In September 2015, after the short informal opening of the German-Austrian border, Germany reintroduced its border controls and intensified its fight against "illegal entry" and the "smuggling of migrants."

According to statistics from Germany's Federal Police Force, 1,535 people were accused and arrested for smuggling in accordance with §96 of the Residence Act (AufentG) in 2013.[14] This number rose to 2,149

12 See Chapter 3.3 for further details about the *Ten Points Action Plan*, the European *Action Plan against Migrant Smuggling* and the military mission *EUNAVFOR MED.*

13 See Chapter 3.3 for further information about the *Summer of Migration*.

14 The statistics from 2013 and 2014 are extracted from the annual report of the Federal Police Force 2014. http://www.bundespolizei.de/Web/DE/Service/Mediathek/Jahresberichte/jahresbericht_2014_file.pdf?__blob=publicationFile&v=5. [Last access 21.01.2017].

in 2014, and reached a total of 3,370 in 2015.[15] Compared to 2013, the number of apprehended "smugglers" increased by 40% in 2014 and 56.8% in 2015. According to the October 2015 reply to a parliamentary question, 2,653 alleged smugglers were apprehended in the period from January to September of that year. Most of these persons were caught at the Austrian border (1,988), followed by the Czech border (307), and finally, the Polish border (107) (DBT 18/6445 2015: 5). In November 2015, as a response to the increased border crossings during the summer, Germany's Federal Ministry of the Interior announced the launch of a German-Austrian Police Cooperation Centre. With its location at Passau, close to Germany's borders with both Austria and the Czech Republic, the Centre aims to strengthen exchange of information and analysis concerning migration routes, "asylum situations," and border crossings.[16]

4. COUNTER MOVEMENTS

Ever since heightened efforts to criminalize and combat "illegal migration" and "human smuggling" began to appear on the German political agenda in the 1990s, efforts to counter such discourses have also been prevalent. German artists, academics, and leftist activist groups have strongly criticized the evolution of today's dominant "smuggling" discourse and the restrictive, securitized measures to combat migration that have developed along with it.

One of the first civil society groups in Germany to challenge dominant discourses around "illegal migration" and "human smuggling" was the *Research Centre for Escape and Migration (Forschungsstelle Flucht und*

15 The number of 2015 is extracted annual report of the Federal Police Force 2015 http://www.bundespolizei.de/Web/DE/Service/Mediathek/Jahresberichte/jahresbericht_2015_file.pdf?__blob=publicationFile&v=2. [Last access 21.01.2017].

16 http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2015/11/deutsch-oesterreichisches-polizeikooperationszentrum.html. [Last access 21.01.2017].

Migration (*FFM*)), founded in 1994. The group specializes in research about the German-Polish border situation. Taking the interests and rights of refugees and migrants as their starting point, the members of *FFM* developed a critical approach towards European and German border and migration policies throughout the 1990s. Already at this time, the group criticized the dominant "smuggling" discourse in Germany and cited the Cold War period as a time when different, more positive opinions of escape facilitation were held by many Germans. The *FFM* claimed that a change of terms had occurred, from "human smuggling" to "commercialized facilitation to escape,"[17] underlining the fact that facilitation of escape is a service people supply to migrants who request it. In their political work, the Centre has monitored illegalized border crossings and the criminalization of escape facilitation. They have also observed court cases and published their findings in different papers.[18]

Within the field of arts, critical reflection on the dominant smuggling discourse has also been notable. The German performance collective "*andcompany&Co.*" created the opera "*Orpheus in der Oberwelt: Eine Schlepperoper*" (Orpheus in the Overground: A Smuggling Opera) in 2014. In the piece, the group connects the Orpheus myth to contemporary migration journeys to Europe, from Turkey to Greece through the Evros River.[19] Orpheus appears as the modern "smuggler" who tries to defend his commercial business. The opera refers to the different connotations of smuggling and to the Cold War period, when facilitation of escape was viewed as a heroic act. The group has performed the piece in different theaters throughout Germany, as well as in Switzerland and France. They also created an audio version of the performance that won the "Prix Europa" for best audio drama (Anderl/Usaty, 2016: 51).

17 http://ffm-online.org/wp-content/uploads/2012/08/Dienstleistung-Fluchthilfe.pdf. [Last access 24.01.2017].

18 http://www.ffm-berlin.de/aboutus.html. [Last access 24.01.2017].

19 http://www.andco.de/?context=project_detail&id=7591. [Last access 24.01.2017].

In the summer of 2015, during the *Summer of Migration*, a collective called *Peng Kollektiv* initiated the campaign *Fluchthelfer.in* that called on civil society to facilitate escapes. Like others previously, the campaign referred to the different perceptions of people who aided those wanting to flee during the Cold War. The collective revived the practice of handing out the European Cross of Merit to those facilitating escape, presenting the "first" one in front of the headquarters of the European Commission in Berlin on 7 August 2015.[20] On their homepage, the group provides guidance on best practices and advice regarding potential legal consequences related to the facilitation of escape. In September 2015, they called for a solidarity convoy, in which a self-organized car convoy headed to Europe's external border to pick up migrants and bring them to Germany. Convoys like this were already active in Vienna at the time that drove to Hungary to pick up refugees there.[21]

Finally, German counter-movements critical of the criminalization of escape facilitation are also shaped by an informal network of activists, journalists, lawyers and legal associations. For instance, the *RAV (Republikanischer Anwält_innenverein)*, a lawyers' association, focuses on relevant legal developments and, where possible, tries to use their expertise to intervene from a juridical perspective. The association considers itself to be a left-wing political association that is part of a broader civil rights movement and, as such, it collaborates with different associations and groups on a national as well as an international level. Several members of the *RAV* are interested in and seek to undermine the different ways and modes in which the facilitation of escape[22] has been criminalized, including through the provision of defense counsel to some of the accused.

20 http://www.taz.de/!5221496/. [Last access 03.02.2017].

21 http://www.fluchthelfer.in/#. [Last access 24.01.2017].

22 RAV: http://www.rav.de/verein/selbstverstaendnis/. [Last access 24.01.2017].

During the period of the research project on *Controversies in European Migration Policies – Granting Protection vs. Border Control*, an extensive amount of material and information was analyzed through in depth research, including trial verdicts, indictments and media reports concerning smuggling offenses in Germany. Trials were monitored and contacts developed with defense lawyers in this field. The following case studies are a selection of the material collected over the course the project. They focus on the personal backgrounds and motivations of people who decide to facilitate the "illegal entry" of others, and on the juridical measures used to criminalize their actions.

5.1. COMMERCIALIZED AND ORGANIZED SMUGGLING

Background

In August 2015, a man of Egyptian nationality was convicted of commercial and organized facilitation of "illegal entry" in accordance with §97 of Germany's Residence Act. According to the verdict, he received a custodial sentence of three years and ten months.

Prior to his arrest, the defendant had lived for the last four years in Italy, where he organized journeys, mainly for Syrian citizens, from Italy through Austria and Germany to Scandinavia. He cooperated with his brother, who lived in Germany, and two other Palestinian Syrians from Berlin. They offered their services for 600-750 Euro per journey. At the time of the proceedings, his brother had already been sentenced to two years and 10 months of imprisonment, while the other two had been sentenced to one year and six months each, with an additional two years on probation. According to the verdict, the other convicted men had made severely incriminating statements about the defendant, which led to his arrest in Italy and transport to Berlin for trial. All of

those convicted in the case confessed that humanitarian reasons served as partial motivation for their facilitation of escape journeys from Italy to other European countries, which played a role in lessening the degree of their sentences. In the case of the two Palestinian Syrians, the court took into consideration that both were personally affected by the humanitarian crisis in Syria, which also motivated them to facilitate the "illegal entry" of others. However, all of them confessed to having supplied their services for financial reasons as well, as each of them was living in a precarious financial situation.

Proceedings

The proceedings took place in August 2015 at the regional court in Berlin Mitte. As the accused had already confessed his guilt, the hearings dealt only with the degree of penalty. According to his indictment, he had acted in contravention of the "smuggling paragraph" (§97) of the Residence Act on 50 separate occasions. However, his defense lawyer negotiated a plea deal, whereby the defendant confessed to around 40 cases and received a sentence of three years and ten months.

It is remarkable that in this case the judges acknowledged that the actions of the convicted men did not harm the lives of their customers, but rather provided them with a form of humanitarian aid, even if done for financial remuneration. However, as German law does not differentiate between different modes of facilitating illegalized entry, they were still held criminally liable for providing facilitation services. The entire proceedings were a "deal" between the prosecutor, the judges and the defense lawyer. In the end, the defense lawyers did not try to challenge the law itself or contest the legal notion of "smuggling," despite the seemingly shared understanding between the legal actors involved that, at times, the broad scope and strict penalties prescribed in the "smuggling paragraph" may serve national sovereignty more than the protection of people from harm.

Background

On 15 March 2016, two brothers of Syrian heritage were convicted according to §96 of the Residence Act and sentenced to a daily-rate financial penalty of 15 Euro per day for 90 days, totaling 1,350 Euro in all. According to the verdict, they were accused of having tried to facilitate the "illegal entry" of two younger Syrian men. One of the younger men was the son of one of the defendants, while the other was the nephew of both defendants. Obviously, the son and father were trying to reunite in Germany, as the father was living in Berlin. The nephew also sought to reunite with his own father, who lived in Lower Saxony. According to the judgement, the son of the defendant called his father from Hungary and asked him to pick him up, along with his cousin, in Austria. On 15 September 2015, the four family members were apprehended at the German-Austrian border by the Bavarian Federal Police Force. According to the police, the two defendants had picked up the two younger men in Austria, brought them to the German-Austrian border, where they exited the car and crossed on foot. The two defendants then picked them up again in Germany, after they had crossed the border. The judge considered the fact that the "smuggling" attempt occurred for reasons of family reunification and, as a result, lowered the penalties applied in sentencing.

Proceedings

In the first hearing on 3 December 2015, both of the defendants were convicted in a reduced criminal proceeding[23] at the local court in Laufen,

23 Reduced criminal proceedings were introduced in order to minimize process expenses. Such reduced proceedings can be initiated if the prosecutor asserts a clear state of evidence, and if the maximum degree of penalty is one year of imprisonment. For further information see the German Code of Criminal Procedure §417-§419, https://dejure.org/gesetze/StPO/417.html. [Last access 22.01.2017].

Bavaria, and sentenced to a financial penalty of 15 Euro per day for 90 days, in accordance with §96 of Germany's Residence Act. On appeal, the sentence was lowered to 10 Euro a day for 90 days, which the defendants appealed again. On 8 September 2016, the first appeal hearing with detailed statements by the defendants took place at the regional court in Traunstein. After the initial hearing, the defendants applied for a public defender,[24] but on 10 September 2016, the court rejected their request on the basis that their situation constituted an obvious case of "family-smuggling." The Bavarian Federal Police Force used similar language when mentioning the case, referring to it "not as a classic smuggling case but as a family-smuggling case." According to accepted legal procedure, German courts have a margin of discretion concerning the denial of the provision of public defense in situations in which they determine the evidence to be clear and straightforward. In this case, the application of the label "family-smuggling," a term not mentioned in German legislation, was used to justify the state of evidence and reject the defendants' request for defense. At the time of writing, the subsequent hearings remained pending.

As seen in this case, the "smuggling paragraph" (§96) of Germany's Residence Act can be used to criminalize family reunification efforts. A new term, that of "family-smuggling," was even developed to enable the criminalization of this type of humanitarian action without allowing the accused to mount a defense. This new term was deployed by the court as an indicator of clear-cut evidence in the case, a determination that then limits the scope of further action available to the defendants. Such a determination can be used to avoid the holding of a real hearing in which the defendants have access to full due process in the form of a public defense lawyer to advocate on their behalf and

24 Accused persons can apply for a public defender, who is supplied by the state. According to §140 of the German Code of Criminal Procedure, the court decides according to several criteria if a defense is necessary during a proceeding, and therefore, if the accused can apply for a public defender. See https://dejure.org/gesetze/StPO/140.html. [Last access 01.02.2017].

question the legal characterization of their actions as "smuggling."

5.3. ASSISTANCE OF "ILLEGAL ENTRY" OR "SMUGGLING"

Background

In autumn 2015, a person was convicted of "assisting illegal entry" and sentenced to 40 hours of community service and ordered to pay court fees. The verdict of "assisting illegal entry" rested on the defendant's actions in having provided another man with a flight ticket from Rome to Berlin, and having accompanied him on the journey. Both men were stopped and arrested in Berlin by a German Border Police officer (Grenzpolizist), as, according to the officer's statement, they seemed "suspicious." Although the police officer's conduct could be seen as "racial profiling," the officer was the only witness to be heard during the trial.

According to the statement of the police officer, the traveler without "adequate documents" for whom the defendant bought the plane ticket was a person of "African origin" who had previously travelled "illegally" to Turkey, where he had intended to seek asylum. As he could not find adequate housing in Turkey, however, he decided to travel on to Europe in order to seek asylum there. After arriving in Greece, he bought a false passport and identity card with a German residence permit for 300 Euro. The documents belonged to the defendant, and had been stolen, along with his wallet, from Germany. Using these false documents, the asylum seeker travelled to Italy.

Upon his arrival in Italy, the asylum seeker contacted the defendant, on whose passport he had been travelling. On 22 March 2014, the defendant travelled to Italy, where he met the asylum seeker in order to retrieve his documents. In exchange for his documents, the defendant bought two tickets for them to fly to Germany.

The case proceedings took place over three days of hearings. During the proceedings, it was discussed whether the incident should be classified as "assisting illegal entry," an offense according to the combination of §95 of the Residence Act and §27 of the Penal Code or, instead, classified as "smuggling of foreigners," as defined in §96 of the Residence Act. The latter offense of "smuggling of foreigners" (§96) comprises the intentional facilitation of "illegal entry" involving one or more of three criteria (1) financial remuneration or other personal benefit; 2) facilitation of entry for more than two people; or 3) repeated entry facilitation activities. In contrast, the offense outlined in §95 criminalizes only the assisting of the crime of "illegal entry" without any of the aggravating circumstances required in §96, thus incurring lesser penalties.

During the three days of hearings, the proceedings focused mainly on the motivation of the person traveling without "adequate documents," why he wanted to enter Germany, how his journey proceeded, and why the defendant bought him a flight ticket to Berlin. The police officer who carried out the arrest of the defendant and the "illegal" traveler was the first and only witness to be heard in court. Notably, the police officer repeatedly referred to the defendant's actions as a "smuggling operation," despite the fact that this terminology was not an accurate legal characterization of the actions in question. By employing this terminology, the police officer already framed the defendant as a criminal.

The defense lawyer, on the other hand, requested that the proceedings be ceased. He referred to Article 31 of the 1951 *Geneva Convention Relating to the Status of Refugees* and its 1967 Protocol, stating that the entry of the traveler was not unauthorized, as long as the traveler planned to seek asylum in Germany. Additionally, the defense presented other verdicts from German courts concerning the Dublin System. As Italy

has recognized deficiencies in its asylum and residence policies, it cannot be counted as a "safe third state," and therefore the traveler, who did indeed intend to apply for asylum in Germany, qualified for a stop of deportation back to Italy. As a consequence, the defendant could not be accused of assisting "illegal entry" either. The defense lawyer called for the traveler to testify in court, in order to give testimony that he had had the defendant's travel documents, which in turn, had obliged the defendant to travel to Italy in order to retrieve them.

After the defense's statement, the judge passed the word to the prosecutor, who stated that she "was not familiar with asylum law and human rights in general" and needed time for research. The judge announced a recess until the following day, when the traveler was scheduled to give testimony before the court.

However, the traveler did not appear the next day to serve as a witness in court, leading to of the defendant's eventual conviction for "assisting illegal entry" (§95 of the Residence Act and §27 of the Penal Code), which was announced on the third hearing day. Consequently, the verdict rested heavily on the statements of the sole witness in the case, the police officer, who did not give a very detailed account of events, relying mostly on the his investigation file from the time, read aloud at the hearing (Statement of the police officer).

6. ANALYSIS

In contrast to the predominant German discourse about "smuggling" as a violent and abusive transnational crime, these three case studies show a range of alternative "smuggling" practices. In contrast to the frequently depicted image of "human smugglers" as part of hierarchical and highly structured international crime rings, the first case study demonstrates that "smuggling" can also occur through loose social networks of people whose backgrounds allow them to better under-

stand the difficult situations, like war, that many people who cannot legally travel experience and seek to escape. It also shows that there is a market for facilitating illegalized entry in which people both supply and demand services for a certain price without any violence or abuse involved. The second case study shows that some "human smuggling" occurs to reunite family members with one another when no legal means to do so is available. Yet, even in such expressly humanitarian cases as family reunification, entry facilitation is still criminalized. Finally, the third case study shows that even in cases of "assisting illegal entry," the discourse and associations of "smuggling" as a criminal offence remain predominant in trial hearings. The stigma of "smuggling" is even extended to people who choose to accompany an undocumented person without financial remuneration or personal benefit. All in all, a wide range of people facilitate the "illegal entry" of other people for different reasons and in different ways. The one-dimensional view of organized, exploitative transnational "smuggling rings" often depicted in public discourse must expand to encompass the diverse positive, not only negative, range of motivations and actions involved in facilitating "illegal" entry/stay in Germany.

The case studies also demonstrate that, in practice, German judges often consider humanitarian motivations when deciding on sentencing. However, German law does not formally exempt humanitarian efforts from its "smuggling" legislation, in contrast to international legal frameworks. In Germany, judges, prosecutors, and defense lawyers decide whether to acknowledge and accord weight to humanitarian motivations in "smuggling" trials on a case by case basis, giving them considerable discretionary power to decide on people's lives. This is particularly troubling as judges, prosecutors, and defense lawyers often have different levels of knowledge about migration law, asylum law and human rights, as demonstrated in the third case study. The extent to which defendants are afforded fair trials therefore becomes questionable. The three cases demonstrate that the "smuggling" of-

fense in Germany's Residence Act is used as a broad measure to stop all forms of illegalized migration, not just abusive smuggling practices, as it criminalizes both "illegal entry" into German territory itself, as well as any and all forms of assistance given to those people "illegally" entering, even in humanitarian situations when no legal means to enter exists.

7. CONCLUSIONS

The construction of "smuggling-as-organized-crime" in public and political discourse in Germany has created an image of a public enemy that, in turn, casts all migrants as vulnerable victims in need of (state-run) protection from brutal smuggling networks. Political and policy responses to these constructions, of victims (migrants) and bogeymen (smugglers), have led to the increased securitization and militarization of border control operations, legitimized on grounds of human rights and protecting migrants' lives (Karakaylai, 2008: 236-237). However, this framework imposes an identity on migrants devoid of any agency and independence. Both in German discourse and legislation, migrants are represented as people who are powerless and unable to make their own decisions. The creators of §96 of the Residence Act legitimize its addition to German law by citing its aim to "protect" migrants from the brutal actions of smugglers. This formula is based on the idea that "smugglers" cause the "illegal" entry of migrants by inciting and coercing people to cross borders. However, the actual reasons for the existence of "smuggling" are the inverse: migrants want to move freely and the dominant political discourse obfuscates the fact that they only rely on the services of escape facilitators to cross borders because there are no longer any legal ways to enter Germany, and more broadly, Europe. As shown, the options for legally entering Germany have been consistently tightened since the 1990s.

The premise that Germany's anti-smuggling legislation is meant to

protect migrants also disguises the fact that there are many different modes of facilitating illegalized entry. As the case studies demonstrate, Germany's smuggling offence is not only used to combat dangerous or exploitative smuggling, but is also used to combat all forms of illegalized entry, even in humanitarian circumstances, by generally incriminating people who make border crossings for others possible. As lawyer Axel Nagler has argued, Germany does not need the additional "smuggling offense" in the Residence Act to combat "smuggling rings" operating in violent and abusive modes, as the German Penal Code already provides for offenses that could criminalize such abusive practices during the facilitation of illegalized entry (Nagler, 2014: 35). Rather, the "smuggling of migrants" phenomenon is a problem created by the German and European border and migration regimes. As long as these regimes try to manage, control and ban migration, they will nourish the business of escape facilitation. If free movement of people was legal, the informal smuggling economy, with its often violent and exploitative structures, would not exist.

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5. COUNTRY REPORT ITALY

Lucia Borghi (Borderline Sicilia), Alberto Biondo (Borderline Sicilia), in collaboration with Judith Gleitze (borderline-europe/Borderline Sicilia)

1. HISTORICAL BACKGROUND

1.1. THE CHANGING FIGURE OF THE "BOAT DRIVER"

After the passing of the *Bossi-Fini*[1] *law*, Italy's migration policy has moved towards tougher criminal sanctions for those irregularly entering Italian state territory, including entrance for the purpose of requesting assistance. This trend continued up to 2009, when the Italian legislature introduced the crime of "clandestine" immigration. Alongside the crime of "clandestine entry," political (governmental) efforts since 2004 have sought to discourage humanitarian agencies and even fishermen from giving assistance at sea.[2] Today, penal sanctions are associated with a range of crimes relating to entering Italy irregularly and can be imposed on traffickers, smugglers, "*scafisti*" ("boat drivers" or literally, "ferrymen," the word *scafisti* is widely used in public discourse all over Italy) and the migrants themselves. There has been a concerted attempt at dissuasion, designed to limit departures from countries of origin and of transit, with little result. The system of border controls has consistently and increasingly shown itself to be in opposition to the humanitarian duties of assistance and aid, as has become extremely clear on the Greek islands off the Turkish coast in recent months.[3]

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1 Law Number189 of 30 July 2002, better known in the public as "*Bossi-Fini*", is the Italian migration rule. Named by the former Vice President of the Council of Ministers Gianfranco and the former Minister of Institutional Reform and Allocation under the second mandate of Silvio Berlusconi. http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2002-07-30;189!vig.

2 In 2004 and 2007 there were important trials against humanitarian rescuers (*Cap Anamur* in 2004 and seven Tunisian fishermen in 2007. See chapter 2.2. The emergence of the legal figure "smuggling" and its consequences.

3 About the actual situation in Greece, see: https://data.unhcr.org/mediterranean/regional.php. [Last access 27.01.2017]

In public opinion,[4] above all via the effect of the language adopted by the most popular sources of information, the distinction between "boat drivers," intermediaries and traffickers has been all but extinguished. Over the past few years, a range of Italian politicians have used different ways to accuse and to prosecute thousands of "boat drivers" and successive governments have established various collaborative relationships with the governments of transit countries.[5] At the same time, the identification and sanctioning of traffickers and smugglers has become increasingly difficult, as they generally remain securely in countries from which they cannot be extradited and where international letters of request fall on deaf ears. The intermediaries, who usually derive from the same communities as the migrants/passengers, constitute an ever-expanding grey zone. As legal methods of entrance have been closed off,[6] the number of migrants nevertheless remains connected to the situation in the countries of origin and of transit, and the policy of criminalizing "boat drivers" has had no deterring effect.

Many lawyers reported to *Borderline Sicilia* that before the launch of

4 "Public opinion" here refers to the opinion of (civil) society.

5 As discussed in this report, the criminalization of rescuers (*Cap Anamur* and Tunisian fishermen) in the years 2004 and 2007, under the governments of Berlusconi III and Prodi II, changed under the new government of Renzi and Gentiloni, resulting in the criminalization of arriving migrants. Bilateral agreements with different African states, for example, are now helping the Italian state to send back the so-called "criminal" migrants as soon as possible.

6 Legal entrance into Italy, as in most European countries, is not possible without a visa. Visas are not normally issued by Italian embassies to citizens of African and Asian countries who are fleeing, not even to Syrians, for example. Therefore, there is no legal way for refugees and asylum seekers to enter. For several years, it has been possible to enter Italy with a working permit received in the country of origin. For some, it has been possible to legalize themselves once successfully in Italy (as an irregular migrant). The so-called "decreto flussi" allowed a determined number of migrants from countries defined by the Italian government to stay in Italy legally. However, this "decreto" was changed and in 2016, for example, there were only a few exceptions. See: http://www.stranieriinitalia.it/attualita/attualita/attualita-sp-754/flussi-2016-attenzione-questo-decreto-non-e-una-regolarizzazione.html. [Last access 25.01.2017].

Mare Nostrum,[7] a range of criminal cases was brought against "boat drivers." These generally finished quite quickly with the accused being free to go due to the absence of witnesses in the trial. Witnesses often withdrew their accusations or ran away from the reception centers (CPAs) in which they had been housed while waiting to be heard by the judge. On other occasions, the guilty party chose an alternative remedy leading to a reduced sentence. In the majority of convictions, the "boat drivers" received an expulsion order. After deportation to their countries of origin, many of the expelled "boat drivers" returned to work transporting migrants. With the passing of time, however, and with the increase in migrants undertaking sea crossings, the figure of the "boat driver" has fundamentally changed. The research of *Borderline Sicilia* from late 2015 shows that on a large number of rubber boats at the time, mostly part departing from the Libyan coastline, one could find migrants who had been specifically trained as "boat drivers," including even minors.

Excursus: Who are the "boat drivers"?
The situation in Libya as a point of departure.

Accounts received by *Borderline Sicilia* from freelance journalists and experts[8] in the field indicate that the situation in Libya has decisively worsened since 2014, with serious repercussions on the conditions of migrants passing through the country in their attempt to reach Europe. In order to better understand the context of "departure," it is necessary to outline the various figures in Libya and their connection with groups of migrants there. To be precise:

7 The *Mare Nostrum* operation was established by the Italian government after the two shipwrecks of 3 and 11 October 2013, in which more than 600 people lost their lives in the Mediterranean Sea. See: http://www.borderline-europe.de/sites/default/files/readingtips/2014_08_b-e_Dossier%20Mare%20Nostrum_wei%C3%9F.pdf. [Last access 25.01.2017].

8 The accounts were received from confidential sources of *Borderline Sicilia*, as well as Nancy Porsia, an Italian freelance journalist working in Libya, see http://nancyporsia.net/. [Last access 27.01.2017].

1) In Libya and elsewhere, there are "traffickers," understood to be those who manage the trafficking of people, organize the forced displacement of thousands of migrants and exploit their conditions of extreme vulnerability and un-traceability.

2) The "smugglers" are those who manage the journeys across the sea towards EU-Europe on behalf of the traffickers. They frequently work with the help of "mediators" in migrants' countries of origin or principal cities of transit, responding to the demands of those who have no other legal way to flee. The conditions of extreme instability in Libya mean that "smugglers" today can often transform themselves into "small traffickers," also using violent and coercive methods.

3) The "migrants" seem, in general, to follow routes depending on their economic situation: Syrians frequently arrive (or, rather, arrived until mid-2015) with contacts and receive quite different treatment on the boats than other migrants from the Horn of Africa or sub-Saharan countries. The recruitment of "boat drivers" usually occurs among these latter groups, with "boat drivers" being those who physically drive the vessel in the sea. They are often trained by force by a group of Libyans before departure. Once they reach Italy, these "boat drivers" are then arrested and criminalized, without having received any kind of compensation or benefit during the journey itself. During the recent agreements made among the participants in the *EUNAVFOR MED*[9] mission, the heads of the Libyan Coast Guard drew concerning analogies with the *EU-Turkey Deal*.[10] In the meantime, the marked political, economic and social instability in Libya today means that even Libyan citizens themselves are witnessing restrictions on their freedom of move

9 Operation *EUNAVFOR MED*, called (military) *Operation Sophia* in the Central Mediterranean. https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/36/about-eunavfor-med-operation-sophia_en. [Last access 27.01.2017].

10 For further information on the *EUNAVFOR MED* Mission and the *EU-Turkey Deal*, see chapter 2.3. Current political strategies.

ment, as well as those migrating from North Africa, such as migrants passing through the country.

1.2. FROM THE *CAP ANAMUR* TO THE UDINE CASE: INVESTIGATIONS AGAINST CIVIL SOCIETY

Since the 2004 *Cap Anamur* case, there has been a political tendency to criminalize humanitarian intervention. At a hearing on 7 October 2009, the court in Agrigento absolved the *Cap Anamur* organization's chairman Elias Bierdel, commander of the *Cap Anamur* vessel Stefan Schmidt, and his first mate, "because the facts did not constitute a crime."[11] They had been accused of aiding and abetting irregular entrance after having rescued 37 migrant passengers from a rubber boat around 100 miles south of Lampedusa in June 2004.

Those who rescue people at sea are not committing any crime. In this case, the sentence clarified that states have to respect international law, which forbids collective pushbacks as well as *refoulement*, as specified in the *Geneva Convention* and in national penal codes.[12] Consequently, Italian law allows the rescue of migrants at sea as a form of humanitarian assistance without any kind of criminalization, as long as the rescue is carried out in a situation of necessity and is provided without the aim of financial profit.[13]

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11 The German humanitarian *Cap Anamur Committee* ran a ship to provide aid in countries of war and crisis. In 2004, because of engine troubles, the ship did a test run nearby Malta and found 37 migrants on a deflating rubber dinghy and rescued them. After three weeks of negotiations, they were able to bring the migrants to Italy, but the commander, the first mate and the chairman of the organization were charged with aiding irregular entrance. http://www.zeit.de/gesellschaft/zeitgeschehen/2009-10/cap-anamur-freispruch. [Last access 27.01.2017].

12 UNHCR, IMO, International Chamber of Shipping: Rescue at Sea: http://www.unhcr.org/publications/brochures/450037d34/rescue-sea-guide-principles-practice-applied-migrants-refugees.html. [Last access 25.01.2017]; and http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html. [Last access 23.01.2017].

13 http://www.borderline-europe.de/downloads/2010_03_08_FULVIO_Vassallo.pdf. [Last access 27.01.2017].

More recently, an Italian state prosecutor investigated a group of humanitarian workers on land who provided assistance to irregular migrants in the province of Udine.[14] Since February 2015, the prosecutor of Udine has investigated seven volunteers for accompanying 30 asylum seekers to the Caritas and for having provided them with their cell phone numbers, food and basic aid in the migrants' "shelters." The investigations also considered that the volunteers gave the irregular migrants precise information about the asylum procedure and how to request international protection as a refugee. The prosecution accused the volunteers of offering this assistance in squatted houses where the migrants had found shelter. Three of the volunteers were accused of aiding the stay of foreigners without valid documents in Italy in order "to gain financial profit," a charge which could incur up to four years' imprisonment. These symbolic cases[15] continue, despite acknowledgement of the increasingly important role played by humanitarian organizations, for instance, in search and rescue activities at sea.

2. CURRENT SITUATION AND LEGAL BACKGROUND: FROM CRIMINALIZING RESCUERS TO CRIMINALIZING MIGRANTS

2.1. CIVIL RESCUE AND MILITARIZATION AT SEA

Today the rescue missions at sea are carried out by navy vessels, merchant ships and humanitarian vessels coordinated by the Commanding Officer of the Italian Coast Guard and the *Maritime Rescue Coordination Centre* (MRCC) in Rome. The rescue missions primarily target migrants amassed on precarious rubber boats that have already half sunk. Even in these dramatic emergency situations, the judicial police

14 http://espresso.repubblica.it/attualita/2016/06/13/news/accompagnano-i-profughi-alla-caritas-e-a-udine-tre-volontari-rischiano-il-processo-1.272059.

15 A similar case to the *Cap Anamur* case happened in 2007 when Tunisian fishermen rescued 44 migrants in distress and were then convicted in Italy, in the first instance, of aiding and abetting irregular entrance. They were absolved only in the second instance: http://www.ilfattoquotidiano.it/2011/09/26/prosciolti-i-due-pescatori-che-nel-2007salvarono-44-profughi-nel-canale-di-sicilia/160076/. [Last access 28.01.2017]. See chapter 2.2. The emergence of the legal figure "smuggling" and its consequences.

nonetheless attempt to look for the alleged "boat drivers." In some interviews guided by *Borderline Sicilia*, the police confirmed that they are unable to intercept the organizers of the voyage in Libya, who abandon the migrants without a trained driver when they embark on boats from Libyan beaches on the way to their destination (Italy).[16]

Nearly every landing of rescued migrants in Italy these days ends with the arrest of the alleged "boat drivers" by the Italian police. Once migrants have been rescued, or transferred after being rescued by humanitarian or commercial ships,[17] the Navy, *Frontex* or *EUNAVFOR MED*-officers try to find out the identity of the "boat driver" while the migrants remain on board the military ship.

If the repressive legal measures against humanitarian operations today (including against people who provide free assistance on land) continue as in the years before *Mare Nostrum*, the result will be the suspension of search and rescue missions. This will lead to an increase in deaths and missing persons, as the European missions – *Frontex Triton* and *EUNAVFOR MED* – are in the same time demobilized. The conflict zone along the coast of Libya has created a situation similar to that found in many other African regions, where, for security reasons, humanitarian interventions must be carried out with military cover. By becoming thus "embedded" with the military, humanitarian efforts become subject to the mandates of territorial control and military defense, priorities which are entirely different from the usual activity of

16 *Borderline Sicilia* and *borderline-europe* conduct daily research work involving talking to migrants who are arriving in Sicily. If in the time before *Mare Nostrum* the migrants were trained to drive a boat, and they often worked as drivers because of the economic situation in their countries, where they had few options for survival. Today, since the establishment of *Mare Nostrum* and the rescue missions, there are no longer trained drivers on board the vessels bringing migrants to Italy. Instead, the traffickers (mostly traffickers in the last months of 2016 and in 2017, and not smugglers) force migrants, many of whom have never driven a boat, to do it. For more on how trafficking is operating today, see Nancy Porsia: http://www.tpi.it/mondo/libia/guardia-costiera-libia-trafficanti-esseri-umani. [Last access 25.01.2017].

17 *Borderline Sicilia* is monitoring the arrival operations in the Sicilian harbors. The operators described this to be what happens.

NGOs. In this situation, humanitarian workers need precise operative agreements and a clear degree of autonomy, both on land and at sea, so that they can continue to carry out their basic missions. Towards this aim, different areas and types of intervention need mutual recognition by the Italian Coast Guard, the *MRCC* and all the actors involved and pressure to limit sustainable activities of those who provide aid and assistance must stop. Repressive efforts to curb what has come to be defined as "illegal immigration" ought not to reduce the working ability of humanitarian organizations.

It is also necessary to avoid imposing the militarization of search and rescue interventions on those humanitarian vessels that still remain, which have managed to save thousands of people in international waters and waters adjacent to the Libyan coast (rescue operations frequently happen in adjacent waters, meaning 12-24 miles off the coast).

The criminalization of rescuers and of migrants driving the vessels does not allow for the identification and punishment of the actual organizers of the journeys, the people to whom migrants are forced to entrust their lives due the lack of other legal routes for entering EU-Europe. As long as legal possibilities to enter EU-Europe do not exist, even missions and operations to destroy the trafficking and smuggling networks in Libya are unlikely to help stop migration. Supply of such services will continue to exist as long as demand for them is necessary.

2.2. CASES AGAINST MIGRANTS AS ALLEGED "BOAT DRIVERS"

2.2.1. INTRODUCTION

In the past few years *Borderline Sicilia* has noticed a significant increase in the number of criminal proceedings commenced against foreign citizens accused of aiding "clandestine" immigration. In the provinces of Sicily where migrants typically land, this activity falls within the remit of the state prosecutor.

As explained by lawyers to *Borderline Sicilia*, since the beginning of *Mare Nostrum* in October 2013, attempts to identify the drivers of vessels used by criminal organizations for crossing the Canal of Sicily have increased, particularly through the use of material (videos, pictures etc.) gathered during the rescue operations. Until 2014, the people driving the vessels were chosen from among the migrants onboard in one of two ways: they were either selected at the moment of embarkation by the traffickers and/or smugglers, or appointed by the passengers themselves at the moment when the Libyans abandoned the vessels a few miles off the coast. From 2015 onwards, however, a new method has been employed by some of the criminal organizations controlling the human trafficking and smuggling. Through information extracted during investigations of alleged "boat drivers" in Italian courts, it appears that on many vessels now, one place is given by the traffickers or smugglers to the "boat driver," and another to the "compass-man," who takes charge of the compass and the GPS. The presence of "helpers," entrusted with handing out food and/or water, has been noted on the larger vessels used for the longer journeys (e.g. from Egypt).

2.2.2. THE INVESTIGATION

Specialized task forces have recently been introduced by the government in relation to irregular migration, allowing the establishment of a system for identifying the alleged "boat drivers," as well as people who could be aware of the facts (potential witnesses[18]). Some of the investigation process commences on board the ships and is later followed up on the quayside of the ports and within the Hotspots[19], with

18 *Borderline Sicilia*, during its monitoring of arrivals, found out that in every landing of rescued migrants, not only were alleged "smugglers" detained, but the police forces also tried to identify those who could identify the driver and the driver's helper from the migrants' boat. For this goal, a task force of different police forces was created (see below).

19 See here about the Hotspot-approach, launched by the European Commission in 2015: http://www.caritas.eu/news/the-hotspot-approach. [Last access 13.03.2017].

the support of *Frontex* and *Europol* officers. For these investigations, the Italian judiciary police use non-professional interpreters, who are frequently migrants that have only recently arrived in Italy and are still awaiting their own residency permit.

From the very moment that rescue and landing operations commence, Italian and EU-European authorities already anticipate the need to identify individuals to be accused of aiding irregular migration, as well as potential witnesses to testify as to the facts. The procedure for identifying these individuals takes into account that it targets people who have just made a journey under extreme conditions and who are often suffering from post-traumatic stress.[20]

Parts of the Italian government and EU apply strong pressure on police authorities to arrest alleged "smugglers." They constantly report on and update information about the arrests of "smugglers" and regularly publish the names of those arrested and pictures from ongoing investigations in the media. The Italian authorities use these efforts to show their efficiency in controlling and managing the migration question. During its research, *Borderline Sicilia* also realized that the police work and control mechanisms used to identify and arrest alleged "boat drivers" rely on the construction of stereotypical schemas and profiling, which further reinforces and perpetuates the stereotypical "criminal profiles" of "smugglers" that are presented to the public.

Through interviews with judiciary police officers, lawyers and officials from the prosecution department,[21] mostly in the province where rescued migrants typically arrive, *Borderline Sicilia* can reveal how the

20 This means that even after a traumatic journey and perhaps traumatic rescue operation, the migrants are nevertheless interrogated by the police immediately in order to find out who could have been the driver. This practice is neither humane, nor an effective investigation method because talking to exhausted, traumatized people will not produce reliable information or credible witness statements.

21 See interviews with members of *G.I.C.I.C.* in the next paragraph.

investigations, arrests and charging of the alleged "boat drivers" and witnesses is performed according to well-established practices and patterns. The chance for an alleged "boat driver" to be freed from accusations is highly dependent on the defense lawyers' ability and willingness during the court trial.

Because of the increasing arrivals of irregular migrants on Sicilian coasts, specialized groups for "illegal" immigration have been created within the judiciary police squads, such as the *Inter-Agency Group Against Irregular Immigration* (G.I.C.I.C.), which has operated in Syracuse since 2006, and the *Group for Investigation into Organized Criminality* (G.I.C.O.), which operates in Palermo.[22]

During a meeting with the head of the Syracuse G.I.C.I.C., *Borderline Sicilia* learned about the different investigative strategies used by the specialized team over recent years, while it heard about its efficiency and reliability. Before October 2013, the investigations into alleged "boat drivers" commenced only once migrants arrived in Italy in autonomous vessels. Since the launch of *Mare Nostrum* in October 2013, however, the investigations have included the possibility of boarding rescue ships directly or otherwise establishing direct contact with personnel on board for the purpose of information gathering. Before rescued migrants even arrive at port, the police are now already informed about their nationalities, age and other factors that might be useful for mounting criminal investigations. From this information, the police on land not only arrange the staff necessary for the interrogations, such as interpreters, but also begin to form theories about the alleged "boat drivers" on board, based on stereotypes, profiling and past experience. Indeed, various police officers have told *Borderline Sicilia* about cer-

22 *G.I.C.I.C.* and *G.I.C.O* are investigative groups belonging to the Italian Corp of *Guardia di Finanza*. They are now specialized in fighting "illegal migration" and investigating alleged "boat drivers". http://www.procurasiracusa.it/polizia.aspx?id_ufficio_giudiziario=1256&id_ufficio=4671.
[Last access 25.01.2017].

tain of "guidelines" that they follow in order to identify the alleged "boat drivers." According to these guidelines, strong suspicion is often formed towards certain migrants based only on their nationality:

> "Besides the Tunisians and Egyptians, who are always at the top of the list of suspects, there are the Gambians, because they can be blackmailed to learn to drive, the Senegalese because they're fishermen, they know the sea, and the Ghanaians and Somalians because they're already deeply involved in trafficking of this kind."[23]

During the investigations, police place a big focus on "body language," such as attempts to hide among the other passengers, irritability, agitation, or evidence of petrol on the hands, which might indicate use of the engine. All of these factors comprise unscientific indications, freely and instrumentally associated by the police with some migrants' presumed guilt.

The lack of appropriate conditions in which to carry out the investigations into the alleged "boat drivers," as well as the identification processes of the witnesses and the possibility to be blackmailed[24] as a witness, means that without doubt, the Italian judiciary police carry out investigations in accordance with frequently practiced, but otherwise unverifiable schema.

2.2.3. THE ALLEGED "BOAT DRIVERS"

Many of the alleged "boat drivers" report having been violently forced to drive the vessels towards EU-Europe. In particular, they refer to being subjected to prolonged deprivation of their personal freedom, maltreatment, and death threats for weeks prior to departure. Some of the

23 Interview with a responsible of the *G.I.C.I.C.* in Syracuse, 19.07.2016.

24 See paragraph on "Witnesses."

accounts speak of brief training periods under armed threat. From the information gathered, it seems that the traffickers prefer to pick out persons to put in command of the vessels based on their nationality. They are, for the most part, migrants from Gambia, Nigeria and Senegal.

2.2.4. THE WITNESSES

The accounts of some cultural and language mediators and interpreters who speak Tigrinya, Arabic or who are able to understand various other African dialects and languages (Mandinka, Bambara, Wolof, Pular) have confirmed to *Borderline Sicilia* that the interrogations undertaken by the police units and the judiciary police are strongly directed towards obtaining particular declarations right away, even from the stage of initial dockside interrogations. The police identify certain witnesses from among the arriving migrants according to selection criteria that appears quite arbitrary on the surface, but when examined more deeply, seems to divide migrants according to police perceptions of how easily they might be "blackmailed": Many of the witnesses are in fact Egyptian, Tunisian or Moroccan citizens who are at risk of expulsion, rejection and deportation on the basis of active bilateral agreements. Migrants with families are potentially exploitable, as police may promise them a document and/or care for their loved ones in exchange for information. Frequently, the witnesses are chosen from among the migrants who speak the language of the mediator present at the landing operation.

> "The police sometimes make me translate promises, and ask questions without paying attention to the translation. There's very little time, and the alleged "boat drivers" have to be found immediately, so the migrants have to be convinced to provide testimony."[25]

25 Interview with a mediator in Ragusa, 20.07.2016.

From the accounts given to *Borderline Sicilia*, it seems that the interrogation is often led by the investigators (members of the different police units). Some lawyers have confirmed the danger of inexact or unsuitable translation during the questioning:

> "In both the initial questioning and in court, I've often heard things translated badly so as to entrap the suspects, but it's not always possible to intervene and correct the statements. For example, saying that a migrant brought food with him on the boat is very different from saying that he was the one who handed food out to the others. In this instance, the former could get the accused off from having collaborated with the alleged "boat drivers," with everything that means in terms of sentencing."[26]

2.2.5. THE INTERPRETERS

As for the interpreters, they are frequently migrants who have only recently arrived in Italy themselves. Many are asked by the police simply because they have the ability to speak particular languages. Some of them are still waiting for their residency permit decisions and therefore will not refuse the police's requests, despite the fact that they are not paid regularly for such interpretation work, for fear of not receiving a residency permit. This also means that they often find it difficult voice concern about or resist the investigative models adopted by the police, which frequently tend towards blackmail.

2.2.6. THE TRIALS – THE LEGAL SITUATION IN ITALY

To have a better idea of the complexity of the issues that surround the identification of the alleged "boat drivers" and the witnesses, it should be recalled that the alleged "boat drivers" and witnesses are subjected

26 Interview with a lawyer in Ragusa, 26.07.2016.

to hurried dockside questioning and a frontal comparison (that means a face to face recognition) to then proceed to detentions. The fact that suspects are immediately separated from the other migrants the moment the rescue boat lands is a clear sign that the investigations actually begin while still aboard.

The situation is also extreme regarding the young age of many newly alleged "boat drivers." Many are actually under 18, despite the fact that many are registered as adults at the moment they arrive in Italy and are only able to reveal their real age after they have already received a cautionary period in prison and undergone a criminal process in a normal, adult court.

In the context of the hundreds of cases initiated in recent years in the Sicilian courts, there have been very few cases that have managed to find any connection between the "*scafisti*" ("boat drivers") and the criminal organizations that manage human trafficking and smuggling. The driving purpose behind this approach to sea rescue operations, therefore, seems to be the orchestrated selection of a scapegoat to allay the security concerns of the Italian public and bolster confidence in EU-Europe's common border management and control policies.

Table 1: The legal frame in Italy

YEAR	LAW	CONTENT
1998	Immigration Act, legislative decree n. 286, 25 July 1998	This is the primary Italian law regulating immigration, based on the legislative plan of the so-called Turco-Napolitano law (n. 40, 1998). The text was subsequently modified and then abolished in 2002 by the so-called Bossi-Fini law (n. 189, 2002), which involved a reorganisation to reflect tighter controls on both regular and irregular immigration, making entering and staying in Italy more difficult for both workers and asylum seekers.
	Art. 10 bis	Article 10 prescribes the crime of irregular entrance and remaining in Italy, and introduces the EU's so-called Security Package of 2009 (law n. 94, 15 July 2009). Its violation carries a penalty (through amendment) of a monetary payment to the state of €5,000 - €10,000. The presentation of the request for asylum suspends the criminal process, which is then "archived" (dropped) if international or humanitarian protection is granted.
	Art. 12	Article 12 contains the instruments used to oppose irregular immigration. It prescribes the crime of aiding (interpreted as helping, facilitating) the forms of promotion, direction, organisation and financing of human trafficking, as well as the mere physical transporting of migrants without entrance visas (thus without distinction between traffickers and so-called "boat drivers"). The crime of aiding illegal entry carries a maximum penalty of 15 years' imprisonment, with the punishment proportionate to the seriousness of the action of aiding committed by the criminal (the penalties were made stricter through the Security Package of 2009). The penalties, which begin with a minimum of one year in prison and a €15,000 fine for each person who enters Italy irregularly, increase or decrease according to aggravating or attenuating conditions, as provided in the same article. More specifically, if there are more than five migrants who are provided with assistance in entering a country irregularly; if the lives of the passengers or their safety is put as serious risk; if migrants enter Italy irregularly while subjected to inhuman and degrading treatment; if the crime was committed together with at least two other persons (that is, three or more in total) or using false documents; if the perpetrators of the crime used weapons or acted in order to gain an unjust profit (earnings acquired through illegal activities), even indirectly; if the crime was committed to recruit people for future sexual exploitation or working exploitation, especially minors – then the penalties are increased up to another half of the given period. If the perpetrator of the crime of aiding collaborates with the authorities during the criminal procedures, then the penalty can be decreased by up to one half.

	continuation Art.12	In the case of arrests against perpetrators of crimes surprised while committing the act, the article provides for arrest and prison custody only if there is no possibility for other less punitive restrictions on personal liberty (according to a constitutional interpretation provided by the Constitutional Court, sentence n. 331, 16 December 2011) [regulation introduced by the Security Package of 2009]. The regulation also punishes cases of aiding irregular migrants to stay in Italy's national territory for an unjust profit (earnings acquired through illegal activity) and the leasing of dwellings to migrants without permission to stay. The regulation explicitly establishes that rescue activities and humanitarian assistance to help migrants in need
	Art. 21	Article 21 prescribes the methods for determining the entrance of workers, including seasonal workers, from outside of the EU. The regulation reorganised the content, connecting permission to remain in Italy with jobs that count as necessary economic activity in Italy. The regulation aims to reward workers from countries that collaborate with Italy in managing the flow of migrants, and the repatriation of irregular migrants.
1930	Italian Penal Code, so-called "Rocco Code," Royal Decree, 19 October 1930 n. 1398.	The Code contains the fundamental principles and general rules for the suppression of crime.
	Art. 54	The article provides for a justifying cause of the "state of necessity," that is, cases in which the perpetrator of the crime may have committed the offense because they were forced to by the need to save either themselves or another from serious danger. The crime was thus committed, but the perpetrator is not punished (condemned) because it is recognised that they acted in a proportional manner to the danger they faced.
	Art. 81	The article punishes cases of continuous offences, that is, crime committed through activities unfolded in different locations and moments, intended for a single criminal project, so as to provide the method for defining the level of penalty to be imposed on the perpetrator of the crime.
	Art. 110	The article punishes cases of competition (crimes committed in collaboration) during the committing of the crime, establishing the penalty as equal for all of them, recalling the rules which punish particular cases.
	Art. 586	The article provides that if, as a consequence of a malicious crime, the death or harm of a person is unintentionally committed, the perpetrator of the crime is to be punished not only with the ordinary penalties for manslaughter (Penal Code, article 589) or for negligently causing bodily harm (Penal Code, article 590), but with increased penalties for said crimes.

	Art. 589	The article provides the crime of manslaughter to be punished with a prison sentence of up to five years, which can be increased to 15 years if there is more than one dead or injured person.
	Art. 590	The article provides for the crime of negligently causing bodily harm to be punished with a prison sentence of up to two years in the case of serious bodily harm, which can be increased to five years if there is more than one injured person.
2007	Legislative decree n. 251, 19 November 2007	The decree, in accordance with Directive 2004/83/CE, lays down the attribution of refugee status, subsidiary protection and the general content required for international protection.
	Artt. 10 and 16	The two articles establish that those condemned for aiding irregular immigration, according to the sense of Article 12 of the Immigration Act, are excluded from international protection.

The charges levelled against alleged "boat drivers" usually relate to the crimes outlined in Article 12 of Italy's Immigration Act pertaining to aiding "illegal" immigration (*Testo unico sull'Immigrazione*, D. lgs.[27] n. 286, 1998). On top of this, charges for aggravated offenses can include a range of infractions from the Italian Penal Code, such as those relating to Article 81 (continued offenses) and Article 110 (association). Additional charges for aggravating circumstances can also be brought relating to the crime of aiding and abetting in itself, such as having transported more than five people, exposed the passengers' lives to danger, subjected them to inhumane or degrading treatment, acted with the use of weapons, or acted with the aim to profit, including indirectly, up to the accusation of homicide itself (Article 575 of the Penal Code). The severity of the charges depends not only on the circumstances, but also on the legal defense provided. Most migrants rely on public defenders, many of whom are overstretched and therefore underprepared, and most lack the experience to mount the kind of technically specialized defense required by many migrants' circumstances. Convicted "boat drivers" usually receive sentences of around three years' imprisonment, but they can reach up to eighteen years. However, a

27 Legislative decree

large number of exonerations do occur for "boat drivers," through the recognition of the state of necessity involved in the undertaking of the incriminating activity. In accordance with Article 54 of the Italian Penal Code, a person cannot be condemned for having been forced to commit an act through necessity in order to save their own or someone else's person from serious harm in a situation of danger that was neither of their own making nor avoidable, with attention to the proportion of the danger. A number of other migration-related cases have been dropped before initiation of criminal action due to withdrawal of witness evidence.

The sentences handed down in Italy for convicted "boat drivers" always include detention and often high economic penalties. Convicted "boat drivers" are usually required to pay a fine of €15,000–25,000 for each passenger. For most of those sentenced with such fines, these penalties can never be paid off, as most convicted "boat drivers" are people with little to no economic means who have arrived in Italy without any prospects for work, and who frequently arrive with debts taken out to pay for the journey itself. This reality demonstrates, yet again, the urgent need to reform Italian penal procedures in order to guarantee any efficacy for the migrants who are often in legitimate need of protection. Most cases against alleged "boat drivers" end with a plea deal facilitated by the public defender or the chosen "specialist" lawyers (some migrants get addresses of lawyers who are very well known in migrants communities), who prioritize a swift conclusion and softer sentence over a closer examination of the events experienced by the accused while in Libya.[28] Any sentence, however, even a relatively soft one, makes it impossible for the condemned migrant to request international protection.

28 There was no database accessible during the research; *Borderline Sicilia* got this information from the interviewed lawyers.

The accounts of various defense lawyers interviewed confirm how the work, competence and interest to defend their clients of some of them is crucial for the exoneration and freeing of the migrants arrested as alleged "boat drivers."

Many of the defense lawyers for alleged "boat drivers" follow these cases for years. They emphasize that trafficking organizations made a decisive shift in strategy after the beginning of *Mare Nostrum*. Before October 2013, migrants were launched on small vessels or fishing boats intended to reach the Italian coasts directly, or to be rescued near the very end of the journey. With the beginning of *Mare Nostrum* and the execution of rescue operations closer to the points of departure, however, organizers began to launch boats with no intention that they actually reach Italy. The strategic goal became early rescue. Organizers began to load migrants onto smaller vessels or rubber boats in Libya or Egypt, accompany them for a short way, and then abandon them at sea, while facilitating their connection with the international rescue operations.

Defense lawyers claim that before 2013, alleged "boat drivers" were generally people who regularly undertook this role, often making several journeys and gaining substantial economic profit. They also noted the existence of a network of "insiders," or specialist "boat drivers", in Italy and Malta, the existence of which has been confirmed through investigations by the state prosecutor in Catania. While there were occasional cases brought against fishermen or accidental rescuers who came across migrants at sea in need of help, there used to be people who occupied the role of professional "transporters."

From 2013 onwards, security policies dressed up as rescue operations began to create a potential shortcut for Libyan traffickers, which they

started to exploit immediately. With the closure of the Balkan route and the always-increasing demand for smuggling services, the presence of humanitarian vessels just a few miles off the Libyan coast led traffickers to change their working methods. Today, most alleged "boat drivers" are simply passenger migrants, who like the rest of their travel companions, also pay the traffickers/smugglers and suffer the same inhumane and degrading treatment. Sometimes they are chosen before departure and trained to drive the boats, and sometimes they receive a discount on the price for performing the role, or gain the possibility to take another passenger for free. However, this is not always the case. According to many defense lawyers, most of the accused "boat drivers" today were forced to drive the vessel (most frequently a rubber boat) or use the compass or GPS to navigate the boat towards the Italian coast, under duress, constituting a "situation of necessity." Today the alleged "boat drivers" are increasingly identified from among the passengers of the rescued vessels and, as described above, fit a pattern of similar charges and sentences that differ significantly from the patterns observed before *Mare Nostrum* in 2013.

One of the lawyers interviewed defended a migrant who had been arrested on the accusation of aiding "illegal" entrance for having helped drive a vessel with 400 migrants on board. When the vessel sank, 200 people were lost at sea and 17 deaths were confirmed, as their bodies were recovered from the water along with the survivors, who landed at Catania on 13 May 2014. In this case, for the first time, those arrested were also investigated for manslaughter (of the 17 persons who drowned during the shipwreck). The lawyer told us about this case in order to highlight the risk of "exemplary sentencing," which is particularly high in cases that receive extensive news coverage and resonate widely with the public.

The same lawyer also highlighted a number of problems with investigative procedures during such cases, such as the questionable use

and reliance of police officers on informal interpreters during the initial questioning of the migrants after landing: "The accounts taken by the judiciary police immediately after the landing did not match at all with that obtained during the investigative hearing; some of the texts completely deny the former ones."[29] The lawyer also noted the lack of legal possibilities to distinguish between those who organize versus those who physically effect the acts of facilitating illegal entrance. No judgements exist relating to such a distinction.

Although the majority of the lawyers are not particularly interested in working towards this end, other ones in Italy support the idea of modifying the law on the basis of recent precedent. Some suggest, for example, qualifying the action of accused migrants as "self-aiding" in relation to those who essentially undertake the journey with the singular goal of bringing their own person to Italy. Meanwhile, *Borderline Sicilia* is working to show, through different court cases themselves, how arrested migrants are increasingly subjected to inhumane and degrading treatment, resulting in their being themselves victims of trafficking.

Another concerning aspect of these oppressive laws relates to the treatment of alleged "boat drivers" who are unaccompanied foreign minors. The number of minors arrested has notably increased in the last months of 2016. Defense lawyers have also reported a significant number of minors wrongly registered and identified by the police as adults. Even in cases in which the accused young men are visibly recognizable as under 18 years old, the radiological exams always will give only an approximate idea about the real age. Unfortunately, declaration of minor status is often only possible in a few cases, with the arrival of official documents from the country of origin. In the meantime, the minor will have already spent three to four months in a prison for adults, with all the possible consequences of such a situation. In some cases,

29 Interview with the lawyer Francesco Turrisi, Catania, 22.02.2016.

lawyers have failed to do the work necessary to make the minor's true age known.

For the majority of alleged "boat drivers" who are accepted as minors, their cases are suspended on probation while an alternative penal procedure is decided upon by the judges, which often includes the possible exoneration of the minor involved. This process can take between six months and three years, although the average time in the cases examined by *Borderline Sicilia* was 24 months. At the end of this process, given a good result, the minor is exonerated of the alleged crimes. Recently, the number of people in the communities[30] that house the minors during this process has increased notably, due to the concurrent increase in the number of arrests and consignments to such institutions. The migrants who are released after this process paradoxically then have the possibility of a much quicker integration into the host society than their peers in the regular asylum seeker hostels, due to their having been already placed in school and work experience programs in Italy.

It is also often the case that the alleged "boat drivers" are freed due to formal or procedural defects in the proceedings. One lawyer recounted how, for example, between February and September 2011, the police department (*Questura*) in Ragusa failed to consider that the court witnesses, inasmuch as they are also under investigation for illegal entrance into Italy (Article 10 *bis* of the Immigration Act), ought to be considered as suspects for crimes connected to that of the alleged "boat drivers" and, accordingly, guaranteed the same rights afforded to all criminal suspects. Thus, according to legal safeguards, all of the passengers called to provide evidence for the prosecution should have been heard with the help of a lawyer. Since the witnesses had not been

30 These communities are shelters for unaccompanied minors who were under trial. The Italian law foresees a kind of probation for these minors.

provided with lawyers, the defense lawyer managed to have the trial voided on the basis of this violation, resulting in the concurrent freeing of the charges against a dozen alleged "boat drivers" he was assisting. As in this example, there have been various other trials where flaws in the prosecution, exploited by defense lawyers' skills and conscientiousness, have brought positive, definitive results.

Lawyers have also confirmed worrying working methods used by Italian authorities during the initial phase of investigations related to migrants. During this phase, conversations often occur between police and witnesses alone, before the witnesses are then given access to a lawyer, as is their right guaranteed by law. Lawyers have also confirmed that illusory promises are made to the witnesses, such as the promise of residency permits and favorable treatment. Finally, they have also substantiated stories that inappropriate identification methods are used; some witnesses are shown only the photo of the alleged "boat driver," and not the album with the photos of all the migrants who travelled on the vessel.

From a meeting with associations working to protect judicial witnesses and victims of human trafficking in Sicily, *Borderline Sicilia* learned that the police frequently convince migrants to stand witness against alleged "boat drivers" through the promise of providing them with a residency permit. However, the granting of this permit and the placing of the migrant in a program of protection and integration, is often quickly followed by an interruption in the system of protection due to a failure to renew documents by the Italian migration office. In practice, once the witness's function has been played out in the prosecution of the alleged "boat drivers," the investigative authorities appear to abandon the witnesses, failing to honor promises to provide them with Italian documents regularizing their status. The witnesses, who can describe the advantages that they were promised by the police in a clear and detailed manner, then find themselves outside of the normal

reception system, deprived of every legal, social and medical protection to which they have rights. The fact that the witnesses are sacrificed in the name of identifying the alleged "boat drivers" is visible from the very moment they land at the ports, when they, sometimes with their families in tow, are forced to remain at the investigative authorities' disposition for a period longer than the usual one (the Italian law foresees a maximum stay in a first reception center of 48-72 hours, the *Standard Operating Procedures* (SOP) for the Hotspot are saying: "the period of stay in the facility should be as short as possible, compatibly with the national legal framework"[31]), and are *de facto* detained (without any appropriate process to justify this limitation of their personal freedom) in inappropriate places (e.g. Hotspot, hub, CAS)[32]. The political and juridical line adopted in Italy, is exponentially increasing the number of trials against alleged "boat drivers" and, consequently, the scale of the immigrant population held in Italian prisons.

3. CASE STUDIES

Since November 2015, *Borderline Sicilia* has conducted several field interviews in Sicily with migrants accused of being "smugglers" and/or "boat drivers," as well as with witnesses involved in the investigation procedures and subsequent legal processes. Below are some of their stories.

3.1. I.M., 20 YEARS OLD, SENEGAL

"I left Senegal in April 2016 because of problems with the head of the village, after me and my parents opposed the practice of the genital mutilation of my sisters. I went to Tripoli to find my friend who was

31 http://www.meltingpot.org/IMG/pdf/hotspots_sops_-_versione_italiana.pdf. [Last access 15.03.2017].

32 Hotspot: See footnote 19. A Hub is a center for migrants who has to be relocated in other European countries. A CAS (extraordinary reception center) is a first reception center for migrants.

working as a house painter. We worked together on a building site for a Libyan man who, in the end, didn't pay us like he'd promised. My friend went back to Senegal via Algeria, and I wanted to go back too, but my friend suggested that I leave for Europe, to be able to support my family.

At that point, a Gambian man explained to me how to get to Italy and how much it would cost, telling me that 99 dinars would be enough. This same African man, for five dinars, took me to a compound managed by a Libyan, along with another nine people who wanted to leave. In this shed there were other people ready to leave, and four Libyans who divided people up according to their nationality. I was put with the other Senegalese. I stayed in that first shed for around a week. After three days, one of the Libyans took me to one side and proposed that I drive the boat. I refused, saying that I didn't have any experience, that I didn't grow up by the sea. The Libyan threatened to kill me. I believed the threat, because in those days I saw the Libyans killing other people with their guns. I remained in the shed for another four days watched over by the Libyans. One night I tried to escape, but I was caught by one of the Libyans [placed] there to guard me, who beat me with a belt. After a week, two Libyans moved everyone that had to leave into another place in Sabratha, where we remained for around a week and where they put me through two lessons about how to drive a rubber boat for 12 hours. There were armed guards always, and it was impossible to ignore their commands. I was scared of going in the sea, but I was forced to do it. I remember only one name, Ali, who was the boss, and it was him who threatened me. We left at night on a Zodiac with 119 passengers on board. On the sight of all those people and the sea at night, I was scared, and again refused to do it, but they threatened to shoot me on the spot. At that point, the Libyan got on the boat as well, started the motor and at the same time another small boat with a Libyan on board left. After less than an hour the Libyan slowed down, but handed the control of the vessel over to me and got on the other

small boat, turning back. The passengers were scared by the scene and begged me to take control of the vessel and save them. During the journey, the motor stopped three times, until in the end we weren't able to start it up again, and the guy with the compass and GPS called the rescue team.

A Coast Guard ship saved us and the following day we were transferred to the Hotspot at Pozzallo. At the entrance to the Pozzallo center one of the mediators (an African called "the Giant"), questioned all the passengers in one big room, speaking in Wolof. He asked who were the ones who drove the boat and invited anyone who knew to speak because they would get a permit of stay for 5 years, would go to Germany and would have a house. The same day the Giant asked me to follow him, I took a shower, they took my finger prints and I was arrested. I remained in prison from 24 July to 23 August. I was subjected to interrogation in the presence of a lawyer and I declared that I had been forced to drive, and I had a chance to tell my story. I only saw my defense lawyer once (his name was given to me by other Africans I met in prison), who spoke English. He told me that he had read the judge's decision and that I would be let out in two weeks. Indeed, after a couple of weeks I was let out. At the police station, they gave me notice of an expulsion order."

3.2. A.M., 25 YEARS OLD, ERITREA

"I'm a former soldier. Tired of the violence I experienced, and unable to continue to suffer in a country where there's no freedom, I decided to leave my country. My parents are dead, and there's no one there for me. So, in February of this year (2015) I left together with other people.

Thanks to our time in the military, I knew a Sudanese man who helped me to get to Libya. Along with other people we met along the way (in the end there were 45 of us), we were sent by the Sudanese man

to other traffickers on the border with Libya, who asked us for 1,200 dinars so that we could keep going. I didn't have enough money, so they took me to a prison in the middle of the desert, where I stayed for four months until I managed to get hold of the sum the Libyans were asking for. Thanks to other Eritreans I met in prison, I managed to get together the 200 dinars I was lacking, but those were four very hard months, in which I was only given something to eat once a day, there was only salt water to drink, and every day we were threatened that we had to hand over the money as soon as possible. Once I gave them the money, they took me to Sabratha along with other people, always escorted by a group of Libyan men who pointed their guns at us. In Sabratha, they asked us for money again, and I and others with me didn't have enough, so we were beaten day and night. I found a portion of the money thanks to some friends, the few who were left with me. Whoever didn't have the money was raped and tortured and then killed, and I saw a lot of people taken outside the building where we were kept, with a pistol to their heads. I was lucky because I managed to get a part of the money sent, so the Libyans put me together with other people who hadn't managed to pay the whole sum, and gave us some tasks to do, like carrying the boat, taking the compass, taking the satellite phone and handing out water and biscuits. I couldn't refuse, I had no choice, otherwise I would have been killed. The day we left they made me get on the boat, with their guns in their hands, and one Libyan got on the boat as well, and another rubber boat escorted us for a short while, after which the Libyan told us to go in one direction, then got on the rubber boat and went in the other.

After around a day, a ship from the Italian navy managed to save us. Once on the ship, we were searched and they took photos of us and they set me to one side, along with a few other people. After we arrived in Palermo we were handed over to a police squad, had our fingerprints taken, and then they took me to prison. I met a duty lawyer only once I was in court, and I never had the possibility to speak with him.

I only spent 13 days in prison, and then I was let out along with nine other people. I was simply shown the door and no one gave us any directions. We wandered around the city with pieces of paper in our hands, which we only understood later were expulsion notices. We've been helped by some volunteers, and are waiting for a lawyer to make an appeal."

3.3. O., 25 YEARS OLD, THE GAMBIA

O. arrived in Italy, at the port of Messina, on the morning of 1 February 2016. Twenty-four hours earlier, an Italian ship – presumably a motor boat from the Coast Guard – intercepted the ship he was on, along with other migrants. As soon as they had boarded the Italian boat, the migrants were photographed and asked to sit at the center of the vessel. They were given water and each received a bracelet with an identity number stamped onto it. Some of them were then called to be asked questions by plain-clothes police officers. To the question, which was put to him several times, as to why he had been picked out from the others, O. responded with certainty:

"I was dressed in a kind of black and grey jacket which was easy to notice and I was sitting in the last place available, which was near to the helm. When the Coast Guard came over to us the captain who was at the helm moved away, going to the center of the boat to hide himself among the other passengers. I was then picked out as one of the possible witnesses who might be of use in identifying the captain. 'Who is the captain? Who is the captain?' They asked me this over and again. I was also in trouble because the three police officers repeated at me: "We know that you know, and so you help us and we'll help you when we arrive. Tell us who the captain is, otherwise when we get to dry land we'll take you to prison and send you back to Gambia. But if you help us, we'll give you a permit for five years, and a place to live and work."

Other than the promises, what terrorized O.(and one could tell this from the number of times that he emphasized that he said he did not want to collaborate, but unfortunately realized that he had no alternative) was the possibility of being deported after having just gone through a journey of nine months and 16 days, in which he had been arrested and beaten several times by the police of the different countries he had passed through. After having thought on it, and after having received food and water, O. gave in to the pressure and they showed him a laptop with photographs of everyone who had been saved. After recognizing and indicating the captain, he was taken back to the rest of the group, which was sitting at the center of the ship.

Once at the port of Messina, he and another six or seven migrants were made to disembark before the others and were subjected to interrogation. A worker from the Red Cross was waiting for them when they got off, asked them how they felt, and then gave them a quick check over (around a couple of minutes), which consisted of checking the pupils and skin to check for any concerning conditions. Immediately after this, they were put into a police van that took them to an office in the city center, where they had their fingerprints taken. O. told *Borderline Sicilia* of having only realized in the following months that this was the immigration officer in the Messina police station (*Questura*). After this, they were taken to the tent-city at Palanebiolo (a migrant reception center). After around an hour, they were called back, one by one, to be subjected to another interrogation. The questions were the same as those he had been asked during the interrogation on board the ship, as were the police officers. The only difference of note was that the interrogator himself was not the same police officer. The other two officers, in the meantime, were nodding in an encouraging way, and smiling at O., saying things like "Bravo, my friend." One of the three, in particular, who had led the questioning on board the ship, calmed down everyone who had collaborated by promising that he would come back and leave them his mobile number in case they needed something. In

reality, they received no numbers. After 20 days spent at Palanebiolo, the rest of the group was transferred to Northern Italy because space was needed for migrants who had just landed at the port of Messina. O. and the other witnesses, on the other hand, were transferred to the former "Gasparro" barracks (an Extraordinary Reception Centre, *CAS*), as it was necessary for them to be kept near Messina until the end of the trial.

O. and the other witnesses were transferred to the former "Gasparro" barracks on the evening of 21 February 2016. After a few days, they were given a document that had been faxed to the center. Following this, the police officer who had driven the van from the port to the immigration office at the police station came to the former barracks and handed over their order to attend the investigative hearing at the court of Messina (*Ordinanza di ammissione*). The police officer calmed them down by explaining that the judge would simply put the same questions to them as had been asked in previous interrogations, and that they would be able to respond without any needless concern. At the end, he reminded them that once the court case was over, they would, as promised, receive documents, housing and a job.

After some time, the manager of *Association Penelope* (which works with victims of human trafficking) came to the center with a document that they could choose to sign. If they signed it, they would be able to have a transfer in a short time. This was very likely a declaration of withdrawal from the protection program, according to Article 18. In any case, O. refused to sign it because he did not want to renounce his rights, for which he was waiting.

O. was then stuck at the former "Gasparro" barracks until the beginning of June, when he was again transferred to Palanebiolo because, as he told *Borderline Sicilia*, the former barracks was to become exclusively a "bambino camp" (a first reception center for minors). Over the past

few months, O. has called the chairwoman of the *association Penelope* many times, who has always replied or called him back, and has been very kind, but forced to explain that she does not have the power to transfer him, that there are no more places available in centers earmarked for permit-holders according to Article 18, and that the fight in which he was involved within the former barracks certainly has not helped the matter.

After all the calls and the attempts to find persons who can help him, O. said that he had gotten a lawyer, although he only saw her once during the initial court hearing, which was postponed. At the second hearing, she was not present and, according to O., was replaced with a duty lawyer.

3.4. L., 16 YEARS OLD, THE GAMBIA

L. was born in The Gambia, where he lived with his family until spring 2015. His father is a farmer and L. attended school until second grade, when his problems began. After his father remarried, he started to beat his first wife (L.'s mother), and L. had to defend her more than once. At a certain point, his father threw him out of the house (along with his two-year-old sister). His mother found a woman who took her in, along with L.'s sister. L.'s mother advised him to leave The Gambia to not risk being beaten by his father again. Thus, in February 2015 he left Banjul on a bus on which there were workers from The Gambia making their way to Libya, crossing Niger and then heading onwards to the desert on a pick-up truck. Here L. recounted that he did not leave the house "because I couldn't trust anyone. I was so afraid of being caught up in the violence on the streets and the rounding up of people without documents." Seeing his situation, other Gambians put some money together to pay for his journey to Italy.

Before departure, an Arab man threatened him with a gun, saying that

he would have to take responsibility for the compass throughout the journey. The other two young men sitting behind him, the penultimate and last in line, he said, would be given the overall command of the vessel, under pain of being shot. It was only later that he found out that, that night, all three departing boats had been driven by the last few people in line. "You can't do anything, everyone in Libya is armed. It isn't possible to refuse an order."

L. left Libya in June 2016, and arrived at Pozzallo in Sicily on 28 June, on board the *Peluso*. "We were at sea for three days. We were rescued after a few hours and then spent two days on the military ship which saved us." As soon as L. was saved, he says, he was kept apart from the other passengers, along with a Senegalese man who had been driving the boat. He was given something to eat and drink, but no more; he could not move, and no one replied to his questions. When the ship came into Pozzallo, they took his fingerprints and, in the presence of an interpreter, he declared that he was 16. The police did not believe him, however, and registered him as born in 1998. L. asked why he had been kept separate from the others, but the police replied that they did not know. Then the prison police arrived and took him to the prison in Ragusa. In prison, L. claims that he told the police and magistrate that he took the compass, and about being made to do so through fear of being killed. At the same time, L.'s wrist was X-rayed, but he did not understand why. "The duty lawyer promised me that he would come back, but days later, still wasn't there. That's why I chose a different lawyer, on the advice of other detainees. When I told the lawyer that I was a minor, he told me that after 10 days I would leave the prison, and I would be able to change my date of birth." In the end, after five days, L. was let out along with the Senegalese man with whom he had been arrested. They took them to the police commissioner, who notified him of his expulsion, after which L. found himself abandoned in the middle of the street. He managed to contact an uncle living in Rome, who in

turn, put him in touch with another uncle housed at a SPRAR[33] project at Capo d'Orlando, near Messina. L. stayed there for several days. Not being able to stay there, he left for northern Italy, sleeping rough for several days before arriving in Milan, where he spent a week hoping to meet a friend who remained uncontactable, and still living on the street. After a few days, his lawyer put him in touch with workers from the *OpenEurope* project,[34] who managed to provide him with housing in Sicily, as well as legal, material and psychological assistance.

4. RECOMMENDATIONS FOR EU-EUROPEAN INSTITUTIONS

1. Insert migrants forced to drive vessels to Italy into the typology of victims of human trafficking;

2. Make a differentiation within internal criminal law and juridical positions (in terms of penalties and the severity of the acts) between those who physically drive the vessels and those who organize the journeys and manage the trafficking;

3. Limit the ban on international protection only to traffickers and organizers, without precluding international protection for those who have physically carried out the activities if recognized as occasional "boat drivers";

4. Introduce processes of greater legal safeguarding in the gathering of evidence for charging the alleged "boat drivers," given that these are crimes committed in foreign territory.

33 S.P.R.A.R. = Service for Refugees and Asylum Seekers that in Italy is managing the second reception facilities for asylum seekers. http://www.sprar.it/english. [Last access 19.03.2017].

34 The goal of the *#Openeurope project* is to inform migrants who are not (any more) accepted in the reception shelters about the social and legal protection. *Borderline Sicilia* is involved in this project giving legal assistance. The project is in partnership with *Oxfam* and the Waldensian Church. http://www.oxfamitalia.org/open-europe-assistenza-ai-migranti-respinti-dagli-hotspot/. [Last access 20.02.2017].

6. COUNTRY REPORT GREECE

by George Maniatis (Diktio)

1. UNDOCUMENTED AND TRANSIT MIGRATION IN GREECE

1.1. HISTORICAL OVERVIEW

Some of the harshest "anti-smuggling" legislation at the international level can be found in Greece. In Europe, Greece has by far the strictest laws of this type. Interestingly, this is quite a recent development, which has taken place within the last 10 years. Before examining Greece's legal framework and its consequences in detail, this introduction gives an insight into the historical and political context of the development of domestic and European migration policies in order to elucidate the interrelation between "illegal migration" and the "facilitation" of such migration in both juridical and discursive dimensions.

Until the early 1990s, migration and its regulation played a minor role in Greek politics. Law 4310, which was enacted in 1929 in the aftermath of the massive population exchange between Greece and Turkey in 1923, remained in place for more than 60 years. However, after the collapse of the "Eastern Bloc," Greece faced its first "migration crisis." In the years between 1990 and 1993, more than 500,000 Albanian migrants entered Greece irregularly, mostly through the mountains along the northern borders of Greece. Greece, historically itself a country of emigration, was rapidly transformed into a "receiving" country, and the Greek borders, highly militarized against its communist neighbor states and the alleged "Turkish threat" on the east, became a place of unauthorized, but constant, migration movement.

The Greek legislature reacted to this radical transformation of migration and borders with a rather short-term, repressive and preventive

approach. The first law it passed, voted on in 1991 (1975/1991[1]), defined migration as an issue of public security, placing it in the remit of the Ministry of Public Order. This restrictive approach, however, could not meet the country's new realities and challenges related to migration. Greek society inevitably had to face a multiplicity of social needs and demands that arose out of the presence of migrant populations, their creation of social ties, and their participation in the economy. The phenomenon of migration, in all its dimensions, put pressure on the government to react in a broader way. After 1997, the Greek government established policies for the collective regularization of undocumented migrants residing in the country.

Nevertheless, throughout the 1990s and 2000s, illegal border crossing and illegal residence remained a constant feature of the migration process in Greece. Similar to other Mediterranean countries in the EU, irregular migration in Greece was shaped by and gave shape to a migration regime characterized by the persistence of migrants' irregular status. The migrant population was integrated into society merely through the informal labor market, rather than through the development of comprehensive migration policies oriented towards the regulation of entry and residence and the acknowledgement of social and political rights.

Beginning in the early 2000s, the Greek migration and border regime underwent a new period of transformation, initiated both by the significant increase of unauthorized border crossings at the Greek-Turkish sea and land borders, as well as the intensified process of Europeanization of the country's border and migration policies. In contrast to the wave of labor-driven migration from Balkan countries in the 1990s, the new movements of migration from Central Asia, the Middle East

1 Law 1975/1991. Entry-exit, residence, work, deportation of foreign nationals, recognition procedure of foreign refugees and other provisions. Government Gazette No. 184, 04.12.1991.

and North and Sub-Saharan Africa in the 2000s differed significantly. Not only were the migrants' countries of origin more diverse, but the migrating populations also included a large presence of asylum seekers. Greece was no longer only a "country of destination" for migrants, but it also became a "transit country" along the way to other European countries with more developed economies, welfare systems and established migratory communities. Consequently, the political and social tensions related to irregular migration spread in Greece from the "exterior" Greek-Turkish border area to the country's "inner"-European borders, namely the Schengen sea-border with Italy and the so-called Balkan Route(s).

This meant that not only Greece, but also other European countries, and the EU, began to have an interest in regulating irregular migration towards Greek territory. In the context of the eastern enlargement of the EU, the new "inner"-European countries were interested not only in those who entered Greece, but also in how many migrants, and who specifically, exited Greece for another European destination. United by a shared objective, certain supranational policy developments took place, resulting in a process that is now often referred to as the "Europeanization" of migration policies. This "Europeanization" affected Greece's national legislation and triggered crucial changes both at the institutional and operational levels. Greek borders came to be conceptualized as "external borders of the EU," meaning that, from then on, Greece's national policies engaged with "Europeanized" migration and border management measures.

The transposition of EU law into national legislation in Greece led, on the one hand, to the expansion of legislation promoting the normalization and the granting of rights to migrants who already had legal

residence, as well as migrants from vulnerable groups.[2] On the other hand, it also provoked considerable additional restrictions on new migration movements and inner-European transit migration. The most important structural change brought about was the proscription of policies of collective regularization of residence. Established in 2008 in accordance with the European Pact on Immigration and Asylum,[3] this proscription removed a crucial element of migration and social integration policies in Greece, as well as in other countries with "external borders," like Spain and Italy. Instead, the EU imposed an asylum-centric system based on the principle that the responsibility for examining asylum applications falls on the "first country of entrance or registration" (the Dublin Regulation). At the same time, operational cooperation was expanded through *Frontex's* (the *European Border Guard Agency*) involvement in border control policies alongside Greece's national security and law enforcement bodies. European funding to Greece also increased and became a basic resource and guidance for policy implementation.

However, Europeanization became a highly ambivalent and contradictory process. Whilst the EU's migration management approach was concentrated on the prevention of transit migration between EU countries and the intensification of migration and border control policies at the "external borders of the EU," Member States with external borders were incapable and, to a certain degree, unwilling to undertake the role of the main receiving countries for incoming migration towards the EU. In this context, the Greek government maintained their restrictive mi-

2 I.e. protection of victims of trafficking, family unification (2003/86/EC), long time residence (2003/109/EC) etc.

3 Council of the European Union, European Pact on Immigration and Asylum, 24 September 2008, 13440/08..

gration and asylum policy,[4] and did not create sufficient reception and integration infrastructure. Aiming mainly to "discourage" migration, this policy perpetuated Greece's role as a transit country for migrants on the path to their actual destination countries. The "common asylum policy" of the EU appeared to remain merely a euphemism, when, in fact, the national asylum systems in the various member states had notably diverged from each other. Thus, in the late 2000s, the "*Dublin system*" underwent a deep crisis.

Without a policy instrument to regularize migrant residence, and with the chronic malfunctioning of the Greek asylum system, together with the lack of reception capacity, the EU-Europeanization policies had an adverse impact on the protection of migrant and asylum seeker rights in Greece. After 2008, human rights conditions in Greece deteriorated further due to the eruption of the financial crisis and the Greek government's introduction of openly repressive migration policies. In this context, the *Dublin system* faced broad criticism, mainly in respect to human rights abuses occurring against asylum seekers in Greece, but also to a certain extent, due to the xenophobic approach expressed by a wide spectrum of politicians from different political parties in Greece refusing any reception of migrants. Political campaigns and litigation struggles in different countries led to the *de facto* exclusion of Greece from the Dublin system, at first on the basis of individual national judgments and, in January 2011, on the basis of a judgment by the *European Court of Human Rights (ECtHR)*.[5] In practice, this meant that since 2011 no "Dublin returns" were conducted to Greece.

4 Until 2012, Asylum Committees were under the competence of the Ministry of Public Order. Statistics on decisions of asylum applications for the years 2005-2012 indicate an average success rate of 0.026% for applicants granted international protection. See Greek Police, „Statistics of Illegal Migration". N.d. http://www.astynomia.gr/images/stories//2012/statistics2012/06032012-apotelesmata.jpg (in Greek). [Last access 20.02.2017].

5 Case M.S.S v. Belgium and Greece, concerning access to asylum after a "Dublin return to Greece." The judgement condemned both countries for the violation of the *European Convention on Human Rights.*

These contradictions of the EU-European migration and border regime escalated in the summer of 2015, when the so-called "refugee crisis" emerged. The 2015 "refugee crisis" and its management mark another critical turning point in the migration and border policies in Greece and the EU. The mass migration of around one million asylum seekers to central and northern Europe through Greece and the countries of the "Balkan Route" provoked contradictory and "exceptional" policy responses, and brought up tough political controversies between and within each EU Member State. The European Commission and the EU Council drastically intervened, aiming to re-stabilize the Schengen and Dublin systems and to re-enforce "common" European migration and border management. To this end, the EU institutions complemented the clause of the "country of first entrance" of the Dublin Regulation with some measures of "collective responsibility," such as the "relocation program" for a limited number and specific nationalities of asylum seekers from the countries with external borders. Nevertheless, the "*European Agenda on Migration*" of 2015 insists on a Europeanized system of migration management at the "hotspots" of the illegal migration routes and at the points of first entrance into the EU. Enhanced, militarized border control, reintegration of Greece into the Dublin system, a functional system of collective deportations to "safe third countries" funded by the EU budget, and the "fight against smuggling and trafficking networks" were stressed as first-priority measures aimed at "preventing and reducing the incentives" of irregular migration (European Commission, 2015). In the years since the Agenda's passing, the Greek-Turkish borders and the Aegean islands seem to have become the preferred areas of implementation for these policies. Today, these developments are forcing the migration and border regime in Greece into a new period of transformation, with uncertain and highly contested results.

1.2. FACTS AND DEVELOPMENTS IN THE COURSE OF THE "REFUGEE CRISIS"

In the framework of the project *Controversies in European Migration Policies*, this country study focuses on specific cases of persons prosecuted as "facilitators" in the different border regions of Greece, as well as on exemplary cases that triggered public debates in Greece and gave rise to political contradictions on the issue. The period in which the research was conducted was far from being conceived as "normal." It followed the outbreak of the 2015 "refugee crisis" and its development through different phases, from the mass border crossings prior to and after the summer of 2015, to the "opening" of the Balkan Route in late August 2015 and its "closure" in February 2016, as well as the implementation of the *EU-Turkey Deal* in April 2016.

Arrests of foreign nationals by Greek border guard and police authorities for illegal entry and stay			
	2014	2015	2016 (11 months)
TOTAL Greece	77,163	911,471	201,176
East Macedonia and Thrace	2,280	4,907	3,098
Central and West Macedonia	1,996	2,640	2,460
Epirus	9,290	8,867	5,606
Lesvos	12,187	512,327	98,143
Chios	6,518	120,583	40,682
Samos Ikaria	7,633	104,453	15,163
South Aegean	16,052	131,470	19,624
Crete	3,093	3,148	1,634

Arrests of "facilitators of irregular migration" by Greek border guard and police authorities			
	2014	2015 (11 months)	2016 (11 months)
TOTAL Greece	1,171	1,359	865
East Macedonia and Thrace	238	215	212
Central and West Macedonia	167	185	105
Epirus	151	128	82
North Aegean	75	143	101
South Aegean	171	338	102
Crete	65	44	34

Source: Greek Police[6]

The official data provided by the Greek Police illustrates the exceptional character of the period covered by this country case study. The numbers provided indicate that the Aegean Sea was the main route used for illegal border crossings in 2015. The arrests/arrivals on the island of Lesvos made up 56% of the overall arrivals in Greece, Chios made up 13%, Samos 11% and the Dodecanese islands in the southeast Aegean (Kos, Leros, Rhodes etc.) 14%. At the same time, the Greek-Turkish land borders in Thrace/Evros made up only 0.5% of the overall arrivals in 2015. The data on the arrests of facilitators refers mainly to "facilitators of illegal entry" at the Greek-Turkish borders and "facilitators of illegal exit" in the Central and West Macedonia region of Greece, towards Republic of Macedonia. Nevertheless, arrests for "illegal transport within the country" are also included in the numbers. The Greek-Albanian border at Epirus remains a route of irregular migration from Albania and has played only a minor role as an "exit" route towards northern Europe.

The radical increase in illegal entries reflects the underlying political

6 Greek Police. „Statistics of Illegal Migration". N.d. http://www.astynomia.gr/index.php?option=ozo_content&lang=&perform=view&id=55858&Itemid=1240
(in Greek). [Last access 20.02.2017].

developments in the Middle East, including the escalation of the Syrian war in 2014 and the mass refugee movements to Turkey, which added to the already increased transit migration movements towards the EU. At the same time, it reflects the way in which the Turkish and Greek governments reacted to these developments. Turkey, having already over two million Syrian asylum seekers in its territory, followed a policy of tolerance towards transit migration to Greece. In Greece, the newly elected *SYRIZA-ANEL* government (a coalition government of the parties of the Coalition of the Radical Left and the Independent Greeks) followed a policy of withdrawing from repressive migration policies, especially the practices of illegal "push-backs" in the Aegean and the mass detention of irregular migrants. These developments caused a significant decrease in the risks of illegal border crossing in the straits of the Aegean islands. An important part of this partial "humanization" of borders was the social and humanitarian support given to newly arrived migrants along the coasts of the Aegean islands. This changing paradigm of border policies during the 2015 "refugee crisis" is clearly illustrated in the divergence between the numbers of arrested "facilitators" and the numbers of "illegal entries."

1.3. SHIFTS IN THE DISCOURSES OVER FACILITATION AND ASSISTANCE

The actual political developments during the "refugee crisis" had a decisive impact on the discourses in Greece on illegal migration and its "facilitation." During the summer of 2015, a new system of registration without detention was established in Greece, operated by the Greek First Reception Agency with the crucial support of European Agencies, *UNHCR* and big NGOs. The registration procedures at the islands provided the newly arrived migrants with the right to move within the country. This meant that normal travel agencies became involved in the transport of registered migrants to mainland Greece, and an extra ferry was allocated for the transport of migrants from the islands. At the same time, Macedonia and gradually other Balkan countries started to

accept the registration documents from Greece as a pass for restricted and controlled transit towards neighboring countries, until reaching Austria. Thus, since August 2015, registration documents from Greece became a kind of "free pass" for the migrants who traveled from the islands to the Greek-Macedonian borders and entered the "Balkan corridor." Consequently, in the course of the "refugee crisis," border crossing practices changed radically. During this particular period of time, the illegal markets for border crossing became almost redundant. Registration procedures effected a de facto de-criminalization of "illegal" entry, exit and residence, while the provision of services for newly arrived migrants became partially integrated into the normal economy. In this context, dominant Greek discourse on facilitation became highly contested, yet without losing its dominant position. However, discourses treating "illegal" migration as a threat to national security and integrity were marginalized from public debate, as were discourses equating assistance to "illegal" migrants with human smuggling and trafficking. The very practical assistance given to asylum seekers in the field initiated competitive discourses pointing to an unconditional humanitarian duty towards those fleeing from war and persecution. As Greece became a global point of international humanitarian intervention, the offering of assistance to refugees was praised as a virtue. Contrary to discourses criminalizing migration, the perception of asylum seekers as subjects of law with the right of unrestricted access to international protection, regardless of the legality of their entrance or the use of illegal "travel services," gained in social acceptance and political influence in Greece.

The period before and after the closure of the borders of the so-called Balkan Route and the implementation of the *EU-Turkey Deal* in 2016 was a period of intense political and diplomatic activity on the EU-European level. During this time, the political and media discourses in Greece shifted towards a "pragmatic humanitarianism," presented by the Greek government, but also towards nationalistic and xenophobic

discourses that recurred in public debates. The "European solution to the crisis" became the leitmotiv of governmental officials, who faced strong pressure to reinforce the controls over migration and borders, expressed characteristically in the EU Commission's threat to exclude Greece from the Schengen-Zone (Chrysopoulos, 2016). This discourse marked a move from unconditional solidarity with refugees as a duty and obligation of the state, towards the "pragmatism" of migration management as an obligation deriving from Greece's membership in the EU. From this latter perspective, migration is perceived merely as an object of expert management, which necessarily involves the distinction between "real" refugees and economic migrants on the basis of their nationality, as well as the implementation of preventive policies of detention and deportations against illegal migration.

2. THE DEVELOPMENT OF THE LEGAL FRAMEWORK CONCERNING THE FACILITATION OF ILLEGAL ENTRY, EXIT AND TRANSPORT

2.1. THE DEVELOPMENT OF THE LEGAL FRAMEWORK 1991-2014

Law 1975/1991 provided the first definition of "facilitation of illegal entry" as a criminal offense in Greek legislation. Article 33 Paragraph 3 states that "[f]acilitators of entry of an alien into the Greek territory, without being subjected to the control of Art. 4, shall be sentenced with imprisonment up to three months and a fine of at least 100,000 Drachmas."[7] The law subsequently specifies the categories of offenders as "captains of any ship and vessel or airplane and drivers of any means of transportation who transfer from abroad into Greece third country nationals who (…) do not have the right to enter the Greek territory or whose entry has been prohibited for any reason," as well as "persons who move them within the country or facilitate their transport or provide them accommodation" and all the persons "abetting the above mentioned offenses."

7 The fixed exchange rate of Drachma to Euro established in 2002 is 1 Euro = 340.75 Drachmas.

The penalty provided by the law is a sentence of at least one year of imprisonment and a fine of between 100,000 and 1,000,000 Drachmas for each transported person. Aggravating circumstances include cases in which "the transport is committed by profession or for unlawful profit or is committed by public servants or tourist, shipping and travel agents." What is also foreseen is the confiscation of the means of transport after a court decision, with the exception of the owner not being involved in the act. Carriers are obliged to cover the costs of the deportation procedure, including accommodation costs. Illegal exit from the Greek territory is punishable as a criminal offense in the same way as illegal entry, with a sentence of at least three months of imprisonment for the offender. Nevertheless "facilitation of illegal exit" is not defined.

Law 1975/1991 was replaced ten years later by Law 2910/2001.[8] The new law increased the penalties for the general category of "facilitation of illegal entry" to at least three months and a fine of at least 500,000 Drachmas (Article 54, Paragraph 5). Article 55 concerning the "Obligations of Carriers" increased the sentences to at least one year of imprisonment and a fine from 1,000,000 to 5,000,000 Drachmas for each transported person. The aggravating circumstances were supplemented to address the issue of recidivist offenders, who were to be sentenced with at least two years of imprisonment and a fine from 5,000,000 to 8,000,000 Drachmas. Two years later, in Law 3153/2003,[9] two types of the offense were defined as felonies, namely the "transfer in conditions that endanger the life," which provides a sentence of at least five years and a fine of 100,000 Euros, and "causing the loss of life," punishable with life imprisonment and a fine of 500,000 Euros.

8 Law 2910/2001. *Entry and residence of foreign nationals in Greek Territory. Acquisition of the Greek nationality and other provisions.* Government Gazette No. 91, 02.05.2001.

9 Law 3153/2003. *Naval training and other provisions of the Ministry of Merchant Marines.* Government Gazette No. 153, 19.06.2003.

In 2005, Law 3386/2005[10] replaced Law 2910/2001 and was entitled "Entry, residence and social integration of third country nationals." Its aim was to "regulate the chronic problems (…) of registration of foreigners with illegal residence;" to "state the basic principles for the social integration of immigrants;" to adopt "a strategic initiative for the management of the migratory flows," and to obtain "the institutional guarantees in order to avoid the phenomenon of uncontrolled entrance and exit of foreign nationals from the Greek territory." The law defined constituted the offense of the "facilitation of illegal exit" and retained the penalties on the same level with Law 2910/2001, but with a slight increase on the fines. The offense of "facilitation" was defined as anyone who "moves them [foreign nationals] from the entry points, external or internal borders in the Greek territory and, vice versa, to the territory of a member state of the EU or a third country or facilitates the transport or moving in or provides accommodation to conceal them." These provisions reflect and comply with the so-called *Facilitation Directive* of the European Council (2002/90/EC), even though the law is not explicitly referring to it.

Nevertheless, the decisive moment for the toughening up of Greek migration legislation occurred with the amendment of Law 3386/2005 in 2009, with Law 3772.[11] The amendment upgraded all the forms of the offense of "facilitation of entry or exit" from a misdemeanor crime (Plemelima) to a felony crime (Kakourgima). As a consequence, "facilitation" as a criminal offense fell within the competence of the Appeal Courts, whose jurisdiction includes serious crimes punishable with over five years of imprisonment, such as organized crime, forgeries, frauds etc. The upgrading of the offense to a felony resulted in a radical increase of the penalties to be imposed, reaching up to 10 years

10 Law 3386/2005. *Entry, residence and social integration of foreign nationals in Greek Territory*. Government Gazette No. 212, 23.08.2005.

11 Law 3772/2009. *Reforms in forensic service and in therapeutic treatment of drug users and other provisions*. Government Gazette No. 121 A', 10.07.2009.

of imprisonment for each transported person and, in aggravating circumstances, incurring a minimum of 10 years of imprisonment. This amendment from 2009 was later transferred, in full and without changes, to law in 2014, coming into force under the title "Code on migration and social integration and other provisions" (Law 4251/2014).[12]

2.2. THE CURRENT LAW IN FORCE: CODE ON MIGRATION AND SOCIAL INTEGRATION

The current legal framework for the facilitation of unauthorized entry, transit and residence in Greece is provided by Law 4251/2014, in Articles 29 and 30.

Article 29 provides the "Obligations of private individuals and employees:"

> 5. Persons who facilitate the entry or exit from the Greek territory of third-country nationals without performance of the checks stipulated in Article 5 shall be sentenced up to ten (10) years of imprisonment and a fine of twenty thousand (20,000) Euros as a minimum. If the act was carried out with a view to making a profit or by profession or habit, or if two (2) or more persons acted jointly, the above shall be sentenced to at least ten (10) years of imprisonment and a fine of fifty thousand (50,000) Euros as a minimum.
> 6. Persons who facilitate the illegal residence of a third-country national or obstructs the investigations of police authorities to locate, apprehend and deport such national, shall be sentenced to at least one (1) year of imprisonment and a fine of five thousand (5,000) Euros as a minimum. If the act was carried out with a view to making a profit, the above persons shall be sentenced to at least two (2)

12 Law 4251/2014. *Code on migration and social integration.* Government Gazette No. 80, 01.04.2014 http://www.enterprisegreece.gov.gr/files/Pdf/2015/residence_permits_july_2015/N4251-2014_EN.pdf (in English).

years of imprisonment and a fine of ten thousand (10,000) Euros as a minimum.

Article 30 provides the "Obligations of Carriers:"

1. Captains of ships or other vessels or aircrafts and drivers of any means of transportation transferring into Greece third-country nationals from abroad who do not have the right to enter the Greek territory or whose entry has been prohibited for any reason, as well as persons who collect them from entry points, external or internal borders, with a view to move them in Greece or to the territory of an EU Member State or a third country, or facilitate their transportation or provide them with accommodation for concealment, shall be sentenced to: a. imprisonment of up to ten (10) years and a fine from ten thousand (10,000) to thirty thousand (30,000) Euros for each transported person; b. at least ten (10) years of imprisonment and a fine from thirty thousand (30,000) to sixty thousand (60,000) Euros for each transported person, if the offender acted with a view to making a profit or by profession or habit, or is a relapsing offender, or acts in the capacity of civil servant or tour or shipping or travel agent, or if two or more persons acted jointly; c. at least fifteen (15) years of imprisonment and a fine of two hundred thousand (200,000) Euros as a minimum for each transported person, if the act could endanger human life; d. life imprisonment and a fine of seven hundred thousand (700,000) Euros as a minimum for each transported person, if the act referred to in c) above resulted in the loss of life.

Paragraphs 2, 3, 4 and 5 provide the framework for the sanction of transportation companies, travel agencies and owners of means of transport. Paragraph 10 orders the confiscation of the means of transport:

> 10. Property that is derived from the criminal activity [...] or property that has been used, in whole or in part, for the aforementioned criminal activity shall be seized and […] necessarily confiscated by virtue of the sentence.

In July 2015, Law 4332/2015 amended Article 6 of Law 4251/2014 by introducing into Article 14 the so-called "humanitarian exception:"[13]

> "6. The above sanctions are not imposed in the case of rescue at sea, transfer of people in need of international protection in accordance with the principles of international law, as well as in the case of push to the inland or facilitation of travel, for the purpose of falling under the procedures of Article 83 of Law 3386/2005 or of Article 13 of Law 3907/2011 after the competent police and coast guard authorities are notified."

2.3. CRITIQUES ON THE IMPLEMENTATION OF THE "ANTI-SMUGGLING" LEGISLATION

The historical development of the legal framework concerning the facilitation of illegal entry or exit in Greece has been characterized by the progressive tightening of regulations and increases in the severity of prison sentences imposed by the courts. The several amendments to the law have been justified by reference to the preventive function that punishing the "facilitator" can serve in the framework of preventing illegal migration in general. This fundamental political objective

13 Law 3153/2003. *Amendment of the provisions of the Greek Nationality Code – Amendment of Law 4521/2014 to transpose to Greek law Directive 2011/98/EU of the European Parliament and of the Council "on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State" and Directive 2014/36/EU "on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers" and other provisions.* Government Gazette No. 76, 09.07.2015. http://www.ypes.gr/UserFiles/24e0c302-6021-4a6b-b7e4-8259e281e5f3/metan-n4332-2015.pdf (in English).

is inscribed in the development of the legal framework and its specific implementation. The concrete effects of the implementation of the stringent legislation gave rise to broad criticism from different sides, including representatives of the justice system, parliamentarians, human rights and political organizations, as well as professional driver associations.

A crucial point of the critique questions the very constitution of the offense of "facilitation" deriving from the offense of illegal entry. It is argued that facilitation expands the criminal liability to a variety of acts that relate to illegal entry without concretely describing them in their objective elements. Law enforcement authorities and personnel are thus entrusted to subjectively assess each case. Human rights organizations stress that this lack of well-defined criteria contradicts the principle of predictability and equality before the law, and warn against the law's unjust and illegitimate attempts to discourage solidarity practices towards asylum seekers, as well as attempts to criminalize humanitarian assistance, even in cases of rescue operations at sea. (Melissaris, 2016) Throughout the years of its existence, the law has been applied in a fragmented and selective way and there is ample evidence of arbitrary prosecution of humanitarian organizations and political activists, as well as of asylum seekers involved in political struggles.[14]

The major criticism towards the Greek legislation on "facilitation" concerns the severity of the penalties imposed by the courts. Since its emergence as a criminal offense in 1991, "facilitation" prescribes a differentiated and separate imposition of penalties for each illegally transported person, to be merged into a final aggregated penalty. After the upgrading of the offense to a felony in 2009, a case of "facilitation" of more than one person is, in practice, treated by the courts as an act consisting of a series of felonies. As a result, the sentences imposed

14 Ibid.

may reach the maximum term of 25 years of imprisonment provided by the Greek Criminal Code, which makes Greece's penalties for "facilitation" by far the toughest imposed for such crimes in the EU. Lawyers and human rights organizations stress that the actual law in force constitutes a clear example of infringement of the principle of proportionality between the penalty and the criminal offense, a principle anchored in the Greek Constitution and the *European Convention on Human Rights*. Suggestions for legal reform argue that the offense should be defined as a simple and unified act, distinguished from the number of persons transported, which must be treated as aggravating circumstances and not as separate acts.[15]

Criticism of the actual law has also been raised by justice officials and lawyers in relation to dysfunctionalities in the administration of justice. They emphasize the effects of upgrading the offense to a felony and the respective transfer of judicial competence and jurisdiction from Misdemeanor Courts (One-Member or Three-Member First Instance Courts) to Three-Member Courts of Appeal, which handle serious crimes. This transfer of competence resulted in the concentration of a large number of cases concerning facilitation in the Appeal Courts of Greece's border regions, causing a clog in judicial procedures. Direct results of upgrading the offense of facilitation to a felony have included serious delays in the administration of justice, the need for courts to "fast track" judgment processes, and both a considerable increase in pre-trial detention as well as more frequent release of defendants pending trial. Thus, upgrading facilitation to a felony offense further aggravated the chronic problems of the Greek judicial system's slow operation and the overcrowding of prisons.

15 Interview with the lawyer Vassilis Papastergiou, conducted by G.Maniatis in October 2016.

Confronted with these problems and criticisms, the Ministry of Justice twice initiated amendments to Law 3772/2009, once in 2010 and again in 2012. Both proposed amendments were withdrawn during the parliamentary debates. First, in December 2010, Minister of Justice Kastanidis (Panhellenic Socialist Party) initiated an amendment to Law 3994/2011. During the parliamentary debate, Kastanidis referred to the downgrading of facilitation to a misdemeanor crime as a request coming from the public prosecutors. He supported their demand, claiming that the amendment would allow the rapid and effective administration of justice by allowing flagrant offenders, meaning those caught in the act, to be tried immediately for misdemeanors. He further stressed that the amendment would guarantee that offenders would not be released pending trial. Nevertheless, Minister Kastanidis withdrew the amendment after strong criticism from the extreme-right party LAOS, as well as the conservative oppositional party Nea Dimokratia, which argued that downgrading the felony "gives the wrong signal, encouraging criminality."[16]

The same fate awaited the second attempt by the Minister of Justice Papaioannou in 2012, when he initiated an amendment to Law 4055/2012. Papaioannou also referred to demands stressed by the Public Prosecution Offices in the border regions, as well as by the Supreme Court. He claimed that the distinction between the categories of felony and misdemeanor crimes in the other EU countries refers exclusively to the procedure of calculating the imposed sentences by the court. Characteristic of the general political climate, when Minister Papaioannou asked for a unanimous political agreement on the amendment,

16 Deal News online. „Υπερψηφίστηκε το νομοσχέδιο για τη Δικαιοσύνη." N.p., 16.12.2010. http://tinyurl.com/m9avyzk (in Greek). [Last access 20.02.2017].

the current governmental allies Nea Dimokratia and LAOS rejected his appeal by manifestly leaving the chamber. Papaioannou closed his speech saying that even if the approach to the problem remains "a dead end," he would not allow anybody to raise doubts about his intentions in "such issues."[17] This reference to the "sensitivity" of the issue indicates the highly moralized discourses over "smuggling" and "smugglers" in Greece, as well as its dominant perception as a "national issue," which, as such, requires a "national political consensus." It is remarkable that both amendments were withdrawn due to "the lack of national consensus", despite having the required parliamentary majority for their acceptance. It is also revealing that the debate focused exclusively on the administrative burdens imposed on the members of the judiciary and operational problems that result in the release of alleged smugglers pending trial, without any reference to the severe violations that the implementation of the law causes for the rights of the accused persons.

During the "refugee crisis" in July 2015, the newly elected government of SYRIZA-ANEL amended the law by introducing a "humanitarian exception." This exception refers to the exemption from prosecution in cases concerning rescue at sea, the transfer of people in need of international protection, and the facilitation of transport on land if it is to deliver the transported or hosted person to the registration process. In all the aforementioned cases, the police have to be notified in advance. In fact, this amendment introduced the optional provision of the EU *Facilitation Directive* (2002/90/EC), suggesting that Member States should ensure that humanitarian assistance to irregular migrants without a profit-making motive is not criminalized or punished. Nevertheless, the introduction of the amendment was a result of both a change towards a more "humanitarian" approach to migration policies by the

17 Imerisia online. „Δεν προχωρά από κακούργημα σε πλημμέλημα η παράνομη διακίνηση λαθρομεταναστών". N.p., 07.02.2012. http://www.imerisia.gr/article.asp?catid=26510&subid=2&pubid=112815304 (in Greek). [Last access 20.02.2017].

governing party of SYRIZA, as well as the conjuncture of the "refugee crisis," which catalyzed a broad movement of solidarity with refugees and actively mobilized support at the border regions.

3. ILLEGAL ENTRY, EXIT AND THEIR "FACILITATION"

A main aim of this research is to present some crucial dimensions of the practices of "facilitation of illegal migration" that remain obscured or latent in Greece's highly moralizing dominant discourses. This involves an attempt to analyze the concrete practices of illegal border crossings in Greece, which are shaped by and adapted to the specificities of each border. By presenting some exemplary cases of persons accused for being "facilitators" under different circumstances in the period marked by the "refugee crisis," this section aims to provide some crucial evidence of the specific institutional routines and procedures that have evolved in the application of Greece's laws on facilitation.

3.1. THE POLITICAL GEOGRAPHY OF BORDER CROSSINGS

Routes, paths and resources used for irregular migration are of great importance in researching the specific practices of illegal border crossings. The combination of institutional settings, geographical conditions and specific regional social-political characteristics of each border shape the informal practices of irregularized migration. At the same time, these practices have a dynamic character, as they actively adapt to the changing border control policies. Instead of being homogeneous and interlinked practices, the offenses of illegal entry, exit and accommodation of undocumented migrants reveal a multiplicity of actors and a variety of practices, as well as differentiated patterns of law enforcement.

The borders used for "illegal entry" to Greece are mainly the Greek-Turkish sea borders in the East Aegean islands and the land borders of the

Evros region in the Northeast. Borders of "illegal exit" are the northern land borders, especially the Greek-Macedonian borders that lead to the so-called "Western Balkan Route," and the Greek-Italian borders at Adriatic Sea, where the ports of Patras and Igoumenitsa are of high importance. "Illegal exit" is also conducted through the various international airports. Due to its political-geographical position, Greece can be described as a "Schengen island," having sea and air borders to other countries in the Schengen Area.

The routes most taken by migrants in recent years are the straits between the coasts of Asia Minor and the West Aegean islands. Plenty of Greek islands and islets lie within a distance of between 10 to 30 miles from the Turkish shore. The territorial waters are set at six miles offshore, meaning international waters comprise rather narrow strips between Greece's territorial waters off the islands. At the straits, illegalized border crossings are mainly conducted by small fishing boats, recreational crafts, and most prominently, by rubber dinghies. The duration of the trip depends on the speed of the vessel, but does not exceed a couple of hours in good weather conditions. Other routes in the Aegean Sea, i.e. to the coasts of mainland Greece or towards Italy, employ different kinds of ships and bigger vessels, but in comparison, these play a rather marginal role in the total amount of migration movements at sea.

The Evros land border is the second most used passage to Greece. The border is defined by Greece's largest river, named Evros/Maritsa. The border follows the river beds, which vary during the different seasons, with the exception of 12.5 km of land borders near the Turkish city of Edirne. At this part of the border, a border fence was built in order to prevent irregular migration in 2012. The region is highly militarized and some minefields on the Greek side remain active, though they are forbidden by international law.

The geography of "illegal exit" extends, on the one hand, to the northern land borders, and on the other, is concentrated at sea ports and airports. At airports, the practice of evading passport control involves mostly the use of falsified travel documents. At sea ports, the most common practice is to board ferries via their garages, by hiding in automobiles and lorries. At the land borders, a variety of practices occur, extending from crossing the mountains on foot to the use of any means of transport available.

Lastly, there is also a sort of "inner border" within the Greek territory, applied to undocumented migrants. Travel agencies are obliged to carry out document controls for issuing tickets for the ferries or other public transport means. On the Aegean islands, where ferries are almost the only available transport means, these checks are conducted in a stricter way, effectively restricting the movement of undocumented migrants to mainland Greece. The *EU-Turkey Deal* extended the restriction of movement to all the migrants arriving at the islands after 18 April 2016, including, for the first time in Greece, applicants for international protection.

3.2. IDENTIFYING THE "SMUGGLER"

Facilitating border crossing at the different borders involves a multitude of actors and practices. A categorization of "smugglers" that reflects the dominant approach of the EU can be found in the documents of *Europol*. In its annual report on "Migrant Smuggling in the EU" (*Europol*, 2016), the agency estimates that in 2015, around one million migrants entered the EU. Of these, it notes that "[m]ore than 90% of these irregular migrants used facilitation services at some point during their journey," adding that "[i]n most cases, these services were provided by migrant smuggling networks." In order to support this claim, the agency provides a very extensive definition of "facilitation" and "facilitators," according to which "[f]lexible and loose criminal networks

and individuals" who have had a relationship or transaction of any kind with irregular migrants during their migratory journey may fall into these categories. In the agency's understanding, "facilitators" can include "opportunistic individuals," like drivers, boat crew members, guides, translators, "brokers," local or other "leaders," money handlers, corrupt officials, as well as legal companies providing accommodation and travel services, or companies conducting money laundering.

The experience and findings from this country case study contradict basic aspects of this dominant representation of "facilitation/smuggling." The most crucial objection is to the degree of "looseness" and "flexibility" used in interpreting a "criminal network." This is of great importance, as the definition of a criminal network, however "loose" and "flexible" it is, designates a form of organized crime. Yet, the evidence collected in Greece provides a far more differentiated image of the profiles of the persons and networks accused of being "facilitators." Rather than membership in a transnational criminal organization, the "opportunism" of many "facilitators" or "smugglers" arises from vulnerability and exploitation. Persons that are asylum seekers themselves, minors and poor devils are subjected to draconian laws designed for the prevention of and fighting against international criminal organizations and terrorism.

A second contradiction concerns the extent and the content of social practices that potentially fall within the categories of "facilitation." The EU *Facilitation Directive* implies that a distinction should be drawn according to the underlying motivations of the "facilitator," on the basis of profit-orientation or humanitarian incentives. Nevertheless, it does not address the content or impact of facilitation practices, meaning that it fails to consider whether these acts endanger social values and needs, or instead, actually provide and guarantee them. As a result, the provision of services necessary for the subsistence and security of irregular migrants, regardless of whether they are commercialized or

not, are subjected to criminalization. This is evident in Greece, where the implementation of the humanitarian exception did not have a correctional effect on the fragmented, selective, and politically instrumentalized implementation of the law on facilitation.

Thirdly, the findings of this country case study question the use of numbers by EU institutions. Instead of indicating the actual extent of the phenomenon of smuggling, the impressive number of 900,000 "facilitated" illegal migrants subsumes all practices of irregular migration under the category of "facilitation." However, the facts indicate that 2015 was a year of considerable decline in the use of "facilitation services" in Greece. Especially after the opening of the Balkan corridor, a large number of migrants organized their own migratory journeys, without using any kind of "illegal services." Instead, a radical increase in the use of "facilitation services" emerged only after the closure of the borders, when the legal paths for migration to the EU were restricted. Thus, the use of numbers by EU institutions often obscures the conditions under which illegal markets at the borders are created; the numbers tend to present "facilitation" not as a means for accomplishing an existing migration objective, but conversely, they present migration as the result of smuggling. This discursive strategy can be seen as a legitimization of and pretext for zero-tolerance policies towards migration.

4. EXEMPLARY CASES

4.1. THE CASE OF BERND KELLER

Bernd Keller, a German pensioner, was arrested with his wife Godelia Ruckes in late September 2014 on the small island of Symi, in the Dodecanese, for transporting a six-member Syrian family on their private recreational craft from Turkey to Symi. Keller and Ruckes were charged for the misdemeanor offense of "illegal entry in the country" and for the felony of "illegal transport by a vessel of third country nationals having no right of entrance in the Greek territory, repeatedly

and with the purpose of profit."

In their testimonies, given to the Port Authorities of Symi right after their arrest, both appear to confess their guilt. They admitted that they transferred migrants for profit and that they had conducted another illegal transport a month before. Nevertheless, Keller and Ruckes disputed their testimonies the next day, during the hearing by the Public Prosecutor and the Investigating Magistrate of Dodecanese, as well as before the court five months later. They claimed that the interrogation procedure was conducted inadequately, without official translators, and denounced the Coast Guard for pressing them to sign the testimonies written in Greek language.

The absence of official translators is confirmed by the incriminating evidence presented before the court of first instance in February 2015. In the records of evidence, coast guard officers are documented as the translators from Greek, English and German languages, while the records note that an Arabic language translator was not officially appointed. Keller and Ruckes testified without the presence of a lawyer, while the testimonies of two witnesses, both Syrian asylum seekers, appear almost identical. None of the witnesses to the incident, none of the coast guard officers who carried out the arrest, and none of the transported persons that testified at the time, appeared before the court. However, the court rejected the claims of Ruckes and Keller and decided based on the reliability of the incriminating evidence, which consisted exclusively of the written testimonies of Keller, Ruckes, the coast guard officers who conducted the arrest, and two of the transported Syrian nationals. Without questioning the key witnesses in the case, the court convicted both the defendants to 16 and a half years' imprisonment and a fine of 46,000 Euros, along with ordering the confiscation of the vessel. Keller, who had been kept in pre-trial detention since his arrest, was transferred to prison. Ruckes, who had been released in September 2014 pending trial, did not appear before court

and was represented by her attorney.

Keller's lawyers dispute the sufficiency of the evidence used to justify the accusation and contest the reasoning of the court's decision.[18] According to them, neither the profile of the 70-year-old German pensioner nor the capacity of the vessel indicate a professional "migrant smuggling" business. On the contrary, Keller transferred only one family of Syrian asylum seekers for humanitarian reasons. The fact that the couple did not try to conceal their act, but remained at the area of disembarkation and were arrested while sitting in an adjacent tavern, supports this claim.

Keller's case attracted some interest from the German[19] and Greek[20] media, and the German Embassy in Greece contacted him and his lawyers. The court of second instance was due to hear his appeal on 11 January 2017, but the hearing was postponed until 16 January due to the heavy workload of the court. At the start of the process, it became known that the key witness of the case, the coast guard official who conducted the arrest and the two other witnesses whose residence is unknown, would not appear before the court. Keller and Ruckes' lawyer asked the court to order the compulsory summoning of the coast guard officer, who, according to the prosecutor, invoked a vacation trip abroad as his reason for absence. Finally, the court decided to postpone the trial until March 2017 and ordered the summoning of the coast guard officer.

Keller's case provides key insights that reach beyond the specificities

18 Interview with the lawyer Vassilis Papastergiou, conducted by G. Maniatis in October 2016.

19 Buchen, Stefan. „16 Jahre Haft wegen „Schlepperei." *Tageszeitung*. N.p., 14.09.2016. http://www.taz.de/!5336068/ (in German). [Last access 20.02.2017].

20 Αγγελίδης, Δημήτρης. „Μια καταδίκη για διακίνηση προσφύγων και το μπέρδεμα με τις καταθέσεις." *Η Εφημερίδα των Συντακτών*. N.p., 02.09.2016. https://www.efsyn.gr/arthro/mia-katadiki-gia-diakinisi-prosfygon-kai-mperdema-me-tis-katatheseis (In Greek). [Last access 20.02.2017].

of the case and the elements that make Keller an "atypical" "facilitator". His case sheds light on some of the actual practices and routines of law enforcement and legal procedures at the Greek-Turkish borders.

4.2. PROTESTS OF THE SMUGGLERS

In January 2016, 22 Syrian, Egyptian and Afghani prisoners in the prison of Chios started a hunger strike. The strike became publicly known weeks later, only when hunger strikers were brought to the hospital of Chios with health problems. The local press covered the case with a number of articles, most of them having a title along the lines of: "The hunger strike of the traffickers." According to these articles, out of the 150 prisoners at Chios prison, 80 had been sentenced as "facilitators of illegal entry" and were serving sentences of up to 25 years. The hunger strikers protested against the heavy sentences and demanded a revision. Many claimed that they themselves were asylum seekers who agreed to drive the boats as an indirect form of payment to the actual smuggler for their transport.[21]

Nine persons, identified as "captains facilitating illegal entry" and held in Chios Prison, were interviewed in an article by Alexis Gaglias in December 2015.[22] At that time, 61 of the 151 prisoners detained in Chios were accused or convicted "facilitators:" 46 were of Turkish nationality, 12 of Ukrainian nationality, and nine of Syrian nationality. According to the journalist, most of them were young, with low educational levels, and only three had professional experience at sea. Most of the

21 Pyliotis, Thodoris. „Απεργία πείνας από Σύριους και Αφγανούς διακινητές προσφύγων στις Δικαστικές Φυλακές Χίου." *ERT Aegean*. N.p., 19.02.2016. http://www.era-aegean.gr/?p=7626 (in Greek). [Last access 20.02.2017]; and Papadopoulos, Giannis."Στη φυλακή των δεκάδων διακινητών." Kathimerini. N.p., n.d. http://www.kathimerini.gr/851058/gallery/epikairothta/ereynes/sth-fylakh-twn-dekadwn-diakinhtwn (in Greek). [Last access 20.02.2017].

22 Gaglias, Alexis. „Χίος: Στις «Φυλακές των Διακινητών»." *The Huffington Post*. 01.12.2015. http://www.huffingtonpost.gr/2015/12/01/koinonia-matanasteytiko-xios-diakinites_n_8686418.html?1448969584&utm_hp_ref=greece# (in Greek). [Last access 20.02.2017].

individuals interviewed had been arrested during 2015 and were still being held in pre-trial detention. Those who had been convicted were sentenced to the maximum term of 25 years of imprisonment.

Official data concerning the number of persons imprisoned for "facilitation" in Greece is not systematically available. In 2014, the Ministry of Justice published statistics on the general prison population in Greece as of 1 January 2014.[23] According to those statistics, the number of persons imprisoned for "facilitation of illegal migration" amounted to 1,241 out of a total of 11,988, that is, 10% of the total prison population. The statistics also showed that "facilitators" comprise the third largest category of prisoners in Greece, after the categories of "thefts and robberies" and "possession and trafficking of drugs." No information about the level of penalties or the nationalities is available. Yet, it can be safely assumed that imprisoned "facilitators" are, in the vast majority of cases, foreign nationals, and that they have been convicted with sentences of more than ten years' imprisonment. Taking into account the number of arrests per year since then, it can also be assumed that their percentage in the total prison population is increasing.

The evidence clearly reflects the effects of Greece's progressively harsher migration legislation since 2009 and its strict implementation by the courts. At the same time, results of research carried out in this field contradict the stereotypical figure of the "human smuggler" as a major threat to society and deserving of moral condemnation and exemplary punishment. On the contrary, research indicates a common thread of vulnerability and social precarity among most accused smugglers. Foreign nationals arrested at the frontlines of the EU-European border regime without any social links and supporting networks in Greece are vulnerable to infringement of their basic rights, particularly regarding

23 „Πόσοι και «γιατί» βρίσκονται στις φυλακές σήμερα." *Anexartitos.* N.p., 03.01.2015. http://www.anexartitos.gr/posoi-kai-giati-vriskontai-stis-fylakes-simera (in Greek). [Last access 20.02.2017].

access to legal representation and adequate translation. They also face more risk of being mistreated or pressured during interrogation procedures.

4.3. MINORS AT THE STEER

In recent years, tens of unaccompanied minors have been arrested, prosecuted and convicted for being "captains" who facilitate the illegal entry of migrants. The Greek Ministry of Justice provides no statistical data for the exact numbers of minors kept in juvenile prisons pending trial or after conviction. Meanwhile, the media attention to the issue is rather low and selective, presenting the convicted minors mainly as victims of smuggling networks, without focusing on the fact that they are punished rather than protected by the Greek state.

A case of two young asylum seekers, Alsaleh, from Kobane in Syria, and Jasim, a Yazidi from northern Iraq, who were in pre-trial detention in the juvenile prison of Volos, was brought to the public's attention in 2016 in a documentary filmed by Marianna Economou entitled *The Longest Run* (2017).[24] After a long period of negotiations with the Ministry of Justice, the filmmaker received permission to film inside the juvenile prison. The film documents the everyday life of the convicted young men in the prison, mainly focusing on the communication with their families in Syria and Iraq. The documentary was shown in different festivals throughout Europe and called considerable attention to the issue. One result of this was an illuminating interview on the European TV channel Arte with Greece's Secretary of the Ministry of Justice for Human Rights, Costis Papaioannou, and with Zaharoula Tsirigoti, Lieutenant General of the Greek Police in the Security and Immigra-

24 „The Longest Run | A Documentary by Marianna Economou." N.p., n.d. http://www.thelongestrun.eu/ [Last access 20.02.2017].

tion Department.[25] In the interview, they both present the tensions of applying a strict policy against illegal migration and its "facilitators" in relation to its effects on human rights protection.

Tsirigoti claimed that the police are obliged to implement the law for minors "in the same way as for adults." When a minor is "identified in the testimonies that he was the one at the helm, there is an obligation to arrest him (…) nevertheless the law provides for a smaller penalty for minors who are smugglers," she said. Furthermore, Tsirigoti admitted that "arresting the one who is guiding or steering the boat is very easy" adding that this "by no way means that you dismantled the [smuggling] network." Minors are for her the "easy victims" attracted by the "promise to travel without paying the fare for passing into Europe."

Papaioannou clearly stated that imposing heavy sentences for smugglers is a preventive measure for illegal migration that has "to some extent good effects, but on the other hand one may think and realize that there are people in prison who were not the main ones responsible for the illegal action of smuggling." He stressed that there is a need to distinguish between "a criminal organization, organizing the whole scheme of smuggling in big numbers (…) and the ones who are, let's say, simple players in this field, and may be end up with a penalty of 20-25 years in prison." Papaioannou spoke also about the actual judicial procedures that infringe on the rights of defendants, offering "poor legal representation" and the lack of a "sufficient number of good interpreters." He suggested measures for improvement, such as identifying vulnerable groups in prisons and measures for lenient and alternative sentencing. Nevertheless, he clearly stated that the question of deterring smuggling is not only a legal issue, but a political one. As he noted, Europe and Greece declare that they "will not tolerate undocu-

25 „Machtlos gegen Menschenschmuggler?" *ARTE Info*. N.p., 22.01.2016. http://info.arte.tv/de/zu-wenig-schutz-fuer-minderjaehrige [Last access 20.02.2017].

mented migrants to enter, knowing that undocumented migrants will eventually enter provided that they will be able to afford paying the smugglers."[26]

Cases of minors and, in general, very young "facilitators," indicate that Greece's investigative authorities, coast guard, police, public prosecutors and investigators are not hindered by any legal or institutional restrictions from prosecuting minors for the offense of "facilitation of illegal entry." In practice, exemptions from arresting and prosecuting minors rely almost exclusively on the "personal sensitivity" of the investigators involved in such cases. Hence, as Tsirigoti stated, the responsibility is transferred to the courts, in order to assess the criminal liability of the offender and to decide on the charge and the mitigating circumstances, among them being the age of the offender. In the meantime, this implies that many minors will be detained pending trial for a period which may last up to 18 months.

4.4. SMUGGLING WITHIN THE COUNTRY: THE LESVOS CARAVAN

During the first months of the 2015 "refugee crisis," the transferring of unauthorized migrants with private cars became one of the main practices for assisting the newly arrived migrants on the islands. In Lesvos, the practice became a public issue in the spring of 2015, when hundreds of migrants, including children and vulnerable persons, had to walk distances of more than 40km in order to reach the registration center at Kara Tepe, near the city of Mytilene. Locals and tourists reacted in a spontaneous way at first, and later in a more organized way, by transporting the migrants in their private cars.

After volunteers started to be arrested and accused by the public prosecutor for facilitating the transportation of irregular migrants "within

26 Op. cit.

the country," anti-racist and human rights organizations commenced a political campaign against the "attempts at criminalizing solidarity." Local and international organizations stressed their awareness "that people who offered to help the refugees by driving them to the city are facing the risk of being accused as "smugglers" and getting sentences of long imprisonment." They urged the state and the local authorities to "tolerate, if not encourage, the volunteers' individual help to refugees, instead of criminalizing it."[27] The court cases attracted international attention and in early July, SYRIZA parliamentarian Yannis Zerdelis appeared as a defense witness in court for Dafne Vloumidi-Troumpouni and Dora Tsogari,[28] who ultimately were released. On 5 July 2015, the Deputy Minister for Migration Christodoulopoulou introduced an amendment excluding practices of humanitarian assistance from prosecution, specifically referring to cases of transporting undocumented migrants for the purpose of their submission to the registration process. On 14 June, a massive "solidarity convoy" was organized by social organizations and volunteers celebrating the introduction of the "humanitarian exception."

4.5. RESCUING AS "FACILITATING": THE ARRESTS OF RESCUERS AT LESVOS

On 14 January 2016, the Greek Coast Guard arrested five international volunteers on board a rescue vessel operating in the area near Lesvos. Those arrested were Manuel Blanco, José Enrique and Julio Latorre, three professional firemen from Spain and volunteers for the NGO *PROEMAID* (Professional Emergency Aid), together with Mohammad

27 „Ελεύθερη μεταφορά μεταναστών εντός Λέσβου ζητάει η „Συνύπαρξη"." *Lesvosnews.net.* N.p., 22.05.2015. http://www.lesvosnews.net/articles/news-categories/koinonia/eleytheri-metafora-metanaston-entos-lesvoy-zitaei-i-synyparxi (in Greek). [Last access 20.02.2017].

28 „Wie griechische Behörden Helferinnen und Helfer von Flüchtlingen kriminalisieren." *PRO ASYL.* N.p., 14.07.2015. https://www.proasyl.de/news/wie-griechische-behoerden-helferinnen-und-helfer-von-fluechtlingen-kriminalisieren/ (in German). [Last access 20.02.2017].

Abbassi and Salam Kamal-Aldeen from Denmark, who were volunteering at the NGO *Team Humanity*. They were charged with the felony offense of "illegal transport from abroad to Greece of third country nationals, who do not have a right to enter the Greek territory" and the offense of "carrying a weapon illegally," since their rescue equipment also included a small knife.

The volunteers denied the charges and denounced the Coast Guard for not giving them any information about their rights, not providing an interpreter, and not allowing them to communicate with their embassies. They declared their arrest to be an act of criminalization of humanitarian assistance to refugees, and condemned the Greek government for treating lifesaving actions as human smuggling. The rescuers remained in detention for three days before being released on bail (set at 5,000 Euros each). Mr. Aldeen, the only non-EU citizen (he is an Iraqi-Moldavian national), was released on bail set at 10,000 Euros, was prohibited from leaving the country, and was obliged to report weekly to the police station nearest his residence. Up to now (February 2017), a hearing date has yet to be set.

On 15 January, the Office of the Minister of Shipping and Island Policy, responsible for the Coast Guard, released a "Comment on the volunteers' arrest incidents." The statement, even if it did not specifically mention the facts, contradicted the official claims of the individual coast guard officers involved in the incident, which had been widely circulated by the media referring to the volunteers as conducting human smuggling at sea. The Minister's Office referred instead to a rescue operation that contravened the rules and ignored the competence of the border guard authority. The statement kept careful distance, however, from mentioning the criminal prosecution procedure, and implied that it would be exclusively a matter for the judiciary. After stressing the relations of "good co-operation" with volunteer organizations, the statement indicated that "the Coast Guard has first and foremost the

responsibility for the sensitive and critical issues of rescue operations; this is reasonable and necessary and is fulfilled with absolute success. The few isolated cases which contravene these absolutely necessary and agreed rules, which would not necessarily consist of a punishable offense, are evaluated by the Justice [courts]."

Nevertheless, the Minister's Office ultimately apologized and asked "for understanding from citizen members of solidarity groups for the inconvenience they suffered due to their involvement in the events, which is for us in no way pleasant. In any case, the implementation of the commonly agreed operational rules is the only way of protection."[29]

Hundreds of Greek and international volunteers active in Greece, as well as political and anti-racist organizations, and parliamentarians of the governing *SYRIZA* party came forward to mobilize support for the five rescuers. The international campaign received broad media coverage and a petition to the EU Commission was signed by more than 132,000 people.[30] In October 2016, a representative of *PROEMAID* handed the petition to the Commissioner for Migration, Home Affairs and Citizenship, Avramopoulos, in Brussels. Avramopoulos explicitly stated that the Commission does not want to "hinder [the] activities" of NGOs, adding that a "clearer definition of who is a smuggler and who is not is needed," adding that "experiences such as *PROMEAID*'s should not happen."[31]

29 Ministry of Shipping and Island Policy. „Comment of Minister's Office on the volunteers arrest incidents." *Greek Coastal Guard*. N.p., 15.01.2016. http://www.hcg.gr/node/11849 (in Greek). [Last access 09.02.2017].

30 PROEMAID, Social Platform. *„Criminalising Humanity, Petition to the EU Commission."*, n.d. https://act.wemove.eu/campaigns/criminalising-humanity?utm_source=new_member&utm_medium=facebook-&utm_campaign=criminalising-humanityCriminalising. [Last access 10.02.2017].

31 Ryngbeck, Annika. „Meeting Commissioner Avramopoulos, on behalf of 132,386 Europeans." *www.socialplatform.org*. N.p., 24.20.2016. http://www.socialplatform.org/blog/meeting-commissioner-avramopoulos-on-behalf-of-132386-europeans/. [Last access 09.02.2017].

Nevertheless, there are many reasons not to perceive the case of the five rescuers in Lesvos as just an unpleasant exception in an otherwise continuous relationship of good cooperation between the Coast Guard and rescuers active along Greece's sea borders. Rather, this incident is better understood as a turning point in border policies after the summer of 2015. The state monopoly at the sea borders had to be re-imposed after a period in which rescue operations and the reception of newly arrived migrants to the islands was, to a large extent, undertaken by independent volunteers, solidarity initiatives and NGOs. Targeting civil society organizations aimed to send the message that assisting migrants or monitoring the practices of the Coast Guard at the sea borders would not be tolerated. Such incidents sent a clear warning that those who disobey the message face the risk of arbitrary arrests under laws for human smuggling and the setting up of criminal organizations.

The issue of restricting the field of action of solidarity groups was central in political and media discourses in Greece during the period of ongoing preparations for the closure of the so-called Balkan Route, the creation of "reception camps" and "hotspots," and the implementation of the *EU-Turkey Deal*. This was reflected in discourses aiming to distinguish between "lawful" and "suspicious" volunteers, and used to justify targeted repression measures against specific volunteer groups. In early 2016, common operations for controlling volunteer groups were conducted by *Frontex* and the Greek Police, including massive police checks conducted on international volunteers at the informal refugee camp of Idomeni at the Greek-Macedonian border. Verbal harassment, including threats of arrest, arbitrary house search and other rights abuses were reported.[32] In late January 2016, a joint Ministerial Decision prohibited all the activities of unregistered volunteers at the

32 „Is Greece right to rein in refugee volunteerism?" *IRINews*. N.p., 23.02.2016. http://www.irinnews.org/report/102374/greece-right-rein-refugee-volunteerism. [Last access 10.02.2017].

army-led reception camps, and implemented a system of "certification" for NGOs based on an extensive profiling of their members. In the course of this investigation, independent and unregistered solidarity and human rights organizations were not only restricted from access to the reception facilities, but they were also subjected to the risk of criminalization.[33]

4.6. SMUGGLING TO EXIT THE COUNTRY: CIVIL DISOBEDIENCE IN IGOUMENITSA

On 27 December 2016, two Spanish nationals from the Basque Country were arrested together with eight asylum seekers from Afghanistan, Pakistan and Iran at the port of Igoumenitsa, as they were preparing to board a ferry to Italy with a caravan. From the first moment of their arrest, Mikel Zuloaga and Begoña Huarte claimed political responsibility for their actions, presenting it as a form of civil disobedience "against the European policies of closed borders." A group of activists and members of anti-racist organizations in Greece mobilized support and demanded their immediate release.

The day after the arrests, a press conference was held in Bilbao in which civil society organizations declared their solidarity with the arrested persons and organized a petition for their release.[34] They also published a video featuring Huarte and Zuluaga stating that their action was motivated by their commitment to human rights and emphasizing the right of citizens and social organizations to disobey govern-

33 Observatory for the Protection of Human Rights Defenders. "Greece: Ongoing crackdown on civil society providing humanitarian assistance to migrants and asylum seekers." *International Federation for Human Rights (FIDH).* N.p., 27.04.2016. https://www.fidh.org/en/issues/human-rights-defenders/greece-ongoing-crackdown-on-civil-society-providing-humanitarian. [Last access 09.02.2017].

34 „Petition. Justicia griega: Libertad para Mikelon y Bego." *Change.org*. N.p., n.d. https://www.change.org/p/justicia-griega-libertad-para-mikelon-y-bego-31fc8ef5-bbd1-4a87-972a-fd6e4967dfab?recruiter=53162384&utm_source=share_petition&utm_medium=facebook&utm_campaign=share_facebook_responsive&utm_term=mob-xs-no_src-no_msg (in Spanish). [Last access 20.02.2017].

ments' decisions when they infringe upon human rights, particularly when they transform "borders into places of death, persecution and inhumanity for thousands of people."[35] They also made clear that the action was self-funded by social movements in Spain, motivated by solidarity and not done for profit. Their project aimed to "bring and support refugees in the Basque Country, making it a place of welcome and hospitality," in a time that the Spanish government hesitated to fulfill its minimum obligations in receiving refugees from Greece. In the next days, the Basque Ombudsman,[36] the political party *Podemos*,[37] and many other political and social groups declared their support.

A campaign was also launched in Greece, initiated by social, anti-racist and leftist organizations, which published a common declaration under the title "we are all facilitators of solidarity." They organized a demonstration at the Public Prosecution Office on the day of the hearing and offered legal assistance to the asylum seekers. The Prosecutor and Investigating Magistrate charged the two activists with the felony of "facilitating" illegal exit with the aggravating circumstance of putting the life of the transported persons in danger, and also ordered the confiscation of the caravan. Nevertheless, they released two of the activists on condition that they pay bail of 2,000 Euros each.

The eight asylum seekers were released a day after their arrest and joined the solidarity campaign for the Basque activists, with two of them testifying before the Public Prosecutor. Addressing the media,

35 In https://www.youtube.com/watch?v=FcXrYcdbRfk. [Last access 20.02.2017].

36 Ararteko. „El Ararteko se dirige al defensor del pueblo de Grecia sealandoel caracter umanitario de la actuacion de los cooperante detenidos en ese pais y le solicita que acte en defensa de sus derechos." N.p., 29.12.2016. (in Spanish). [Last access 20.02.2017].

37 Podemos. „Podemos ante la detención de Mikel Zuloaga y Begoña Huarte por el intento de traslado de personas refugiadas en grecia como iniciativa solidaria y de denuncia." N.p., 29.122016. https://podemos.info/podemos-ante-la-detencion-de-mikel-zuloaga-y-begona-huarte-por-el-intento-de-traslado-de-personas-refugiadas-en-grecia-como-iniciativa-solidaria-y-de-denuncia/ (in Spanish). [Last access 10.02.2017].

they said that they were well informed about the project and the possible risks of arrest and that they were transferred in safe conditions, insisting that the action was motivated by solidarity and not for profit. They explained that all of them were asylum seekers of nationalities excluded from the EU's Relocation Program and whose right to asylum is being gradually restricted. They therefore face a high risk of being deported. They thanked Huarte and Zuluaga "for the solidarity they showed and which now we are happy to offer back."

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7. CONTROVERSIES IN EUROPEAN MIGRATION POLICIES – PRESENTED TO AND DISCUSSED WITH THE PUBLIC

by Sara Bellezza (borderline-europe)

Presentation of the events

During the project, from 2015 to 2017, 10 events were organized in Austria, Italy and Germany to increase public awareness about the criminalization of escape aid and other aspects and concrete impacts of national, EU-European, and international border regimes. Forming part of these events was a lively discussion around the numerous possibilities for creating resistance and forms of civil disobedience against restrictive border policies that fail to respect people's rights. In the following section, an outline of the events hosted by three of the four participating organizations is presented in chronological order.

From 16 to 18 October 2015, we hosted our first event, the "Second International Smugglers' Conference" in the Kammerspiele theatre in Munich, in cooperation with *Flüchtlingsrat Bayern and bordermonitoring.eu.*

The conference was made up of four expert panels on:

- The history of the diverse terms used to describe the smuggling of fleeing persons, ranging from "escape aid" to "facilitators of illegal entry" or "human smuggling," depending on the political context
- The varying practices of assisting escape and "smuggling"
- Examples of the criminalization of ordinary people who aided refugees and were accused of smuggling, with accounts of example cases
- Campaigns and creative activism.

Furthermore, three people, or rather groups, were awarded with a prize (The Golden Lisa) for their endeavors to assist refugees to escape, done out of a commitment to the ideals of humanitarianism and universal human rights. The attendance at the conference was high, with more than 100 participants each day. Videos showing the award ceremony, the four panels, and various interviews were published online.[1]

Our second event "Open the borders and tear down the fences! Escape (aid) in times of dynamic border politics" (In German: "Grenzen auf und Zäune nieder! Flucht(hilfe) in Zeiten dynamischer Grenzpolitik(en)") took place in Innsbruck in December 2015, with an attendance of 52 participants.

1 https://vimeo.com/165428144. [Last access 10.04.2017]

The main topic was refugee support in times of securitized borders, mainly focusing on different practices of direct support, the development of court cases against smugglers in Austria, and the historic significance and importance of the convoy created along the so-called Balkan Route during the summer of 2015. Diverse activists, such as Michael Genner (*Asyl in Not*), Anahita Tasharofi (*Flucht nach vorn*), Stephan Blaßnig (*Plattform Bleibrecht Innsbruck*) and Lea Elena Mair (*Binario 1*, Bolzano, Italy) participated as panelists. The activist Anahita Tasharofi discussed her participation in the grassroots escape convoy in which several people drove along the so-called Balkan Route to assist those travelling towards northern and western Europe, and told about her meeting with Austria's former Minister of the Interior Mikl-Leitner in Nickelsdorf, during which a Minister's security escort maltreated her. Currently, Tasharofi is under investigation as a suspected smuggler. However, there has been no official response or follow-up to her complaints against the Minister's escort.

Michael Genner talked about his experiences during the previous year, when migrants and organizations succeeded in creating a migratory corridor from Greece to central and northern Europe. The activist referred to this experience as "our small September of Anarchy." A special focus was also given to the discussion about current court decisions on human smuggling in Austria (see last section) and their impact on future cases.

The activist Lea Elena Mair presented the work of *Binario 1* at Italy's Bolzano train station during the spring of 2015, as well as the current parliamentarian discussions in Italy about refugee assistance and human smuggling.

Finally, Stephan Blaßnig provided an analytical overview regarding the politics of migration control discussed during the G7 summit and during the Bilderberg meeting in May and June 2015, which dealt with

the blockage of the Alps passage to people on the move. He also reported on the new migratory path at the Brenner Pass.

Other topics, such as the tightening of migration laws, the establishment of a "new anti-refugee iron curtain" in EU-Europe, the shift to the right in EU-European politics, and new ways of resistance, were also presented and discussed.

Another event took place in Palermo on 4 April 2016, entitled 'Smugglers' or rescuers? The image of the 'trafficker/smuggler' from the *Cap Anamur* to today" (In Italian: 'Scafisti' o soccorritori? L'immagine del 'trafficante' dalla *Cap Anamur* ad oggi") where a presentation and debate on discourses around and representations of human "smuggling" in Italy and Greece was held. The panel in the "ARCI Porco Rosso" (ARCI is an Italian cultural and recreational Association of social solidarity promoting human rights) was composed of boat Captain Stefan Schmidt (*borderline-europe*), Fulvio Vassallo Paleologo (ADIF), Leonardo Marino (Lawyer, Agrigento), Lucia Borghi (*Borderline Sicilia*) and Judith Gleitze (*borderline-europe*), and was moderated by Alberto Biondo (*Borderline Sicilia*). The panel analyzed different legal cases against suspected smugglers in Italy and the current practices of criminalization (from the criminalization of humanitarian assistance to the current criminalization of migrants). The first two cases – that of the *Cap Anamur* (2004) and that of the Tunisian fishermen (2007) – served as an example of the penalization of humanitarian assistance.
The panel discussion focused on:

- The fact that each arrival of boats on the Italian coast leads to the arrest of a specific number of "smugglers," as required by EU-European and Italian authorities. This strategy refers to statistics that are supposed to evaluate the efficiency of the "fight against smugglers," but which, in failing to also analyze the reasons behind "smuggling," are actually devoid of any insight or impact on the

phenomenon.

- The concern that witnesses are often put under pressure during initial interrogations and falsely bribed with the promise of a residence permit and a better future in Europe. Testimonies that are collected immediately after rescues are therefore often very different from those issued at a later time.
- Three phases that characterize the approach of the Greek government against smugglers in recent years, and that are linked to the economic and political transformations of Fortress Europe:

  1) May to November 2015: criminalization of support practices and indictment of the „transporters“;

  2) November 2015 - February 2016: step-by-step closure of the border with Macedonia, while “Hotspot Lesbos” = “European agenda” and indictment of rescuers at sea;

  3) Since February 2016: the total closure of the border with Macedonia, NATO mission in Turkey to defeat “the smuggling networks,” and the indictment of migrants.

Borghi, Vassallo Paleologo, Marino, Biondo, Schmidt, Gleitze (from left to right). Foto: Frank Jugert

For the fourth event in Vienna on 28 May 2016, Asyl in Not and the organization Fluchthilfe&Du presented the "Human Smuggling Report 2016," which was an ironic allusion to the report issued by the national police. A short introduction regarding the reasons why we felt it was important to issue our own human smuggling report was followed by three contributions focusing on the topics of resistance, prospects and alliances.

Irene Messinger, PhD, started with an account of the history of *Fluchthilfe* (escape assistance) and current developments in the discourse. She further presented different political campaigns tackling the issue, including the second international conference on human smuggling in 2015 in Munich; *Fluchthilfe&Du*, an organization running campaigns uniting the arts and politics; and *Fluchthelfer.in*, an online platform informing about "safe" ways to "smuggle humans." Moreover, she also addressed university courses as well as academic conferences during the last year that focused on the criminalization of human "smuggling." Messinger's analysis showed that the public discourse is dominated by two contrasting images: the figure of the bad "smuggler" and the helpless victim. Therefore, it seems essential to break down this dichotomy.

In the second part entitled "Prospects," Clemens Lahner, attorney at law, provided an overview of legal questions regarding *Fluchthilfe* and human smuggling. He explained how, in criminal law, the intention of an action is sufficient for its punishment. Concerning human smuggling, this implies that any support of an illegalized border crossing can be penalized, including the supply of water, food, train tickets or just giving directions. Therefore, in order to avoid being prosecuted for human smuggling, it is necessary to avoid any suspicion of being paid for the transport or having received any other form of unjust enrichment.

The subsequent contribution on alliances investigated the current situation at the border between Hungary and Serbia. This concerned the Austrian government's plans to issue an emergency-regulation, claiming that the maintenance of public order and the protection of internal security is endangered. As a result, refugees at the border would be deprived of a fair trial and be pushed back into the neighboring country. Those deported back to Hungary are particularly at risk of inhumane treatment, of being immediately imprisoned, and (as part of refoulment) of being sent further to Serbia, where they would not find asylum either.

Asyl in Not is planning to spot those deportees in collaboration with the *Hungarian Helsinki Committee*, to take on power of attorney on their behalf, and take legal action (*Maßnahmenbeschwerde*) against the deportations that violate human rights standards.

The closing of the workshop was composed of a final discussion on perspectives, goals, and scopes for action.

The fifth event took place on 30 th June 2016 in Palermo under the title "Fleeing from Libya – Who are the 'alleged smugglers'?" (In Italian: "In fuga dalla Libia – chi sono veramente i 'presunti scafisti'?")

For years, Italy and the European Union have been dealing with Libya. In 2009, Berlusconi and the former leader of the Libyan regime, Gaddafi, signed an agreement providing for the payment of billions of Euros in compensation for Italy's former colonialism in Libya. Yet, behind this stated aim, the main purpose of the agreement was stopping the "migration flows" from Libya to Italy.

In 2011, during the so-called "Arab Spring," however, the Libyan state fell apart, making the figurative wall erected to stop migration crumble. Even today, and despite the EC's agreements attempting to stop migrants from leaving the African coast, we cannot speak of a stable state when referring to Libya. After an introduction about the EACEA–KideM project by Lucia Borghi, Judith Gleitze gave an overview of the arrests of migrants as "alleged smugglers" in Sicily.

The main questions discussed with the freelance journalist Nancy Porsia in the Palazzo Branciforte Museum were about the actual situation in Libya: Who governs between militias and government forces? What does this mean for migrants who have no choice? Who are the people who organize the journeys of hope and who are the "alleged smugglers"? As she travels and works a lot in Libya, Porsia could give a

good overview of the distinction between "smugglers," traffickers and migrants forced to drive (you will find this in the excursus in the Country Report Italy). Andrea Norzi, deputy prosecutor in Trapani (Sicily) confirmed that the migrants arrested as alleged smugglers are, for the most part, those migrants who had been forced to drive the boats. However, the political pressure to arrest some migrants at every arrival as alleged smugglers is very strong and is very problematic for the Public Prosecution Offices. For him, as a responsible deputy prosecutor, it is difficult to condemn these migrants because he is fully aware of the fact that they are dealing with "simple migrants" and not with real traffickers, who would never accompany the migrants to Europe.

From left to right: Porsia, Norzi, Vassallo Paleologo, Gleitze, Borghi

The sixth event "New escape ways – A deal with a Phantom" (Neue Fluchtwege - Pakt mit einem Phantom) took place on 18 July 2016 in Kiel, where *borderline-europe*, *Diakonie Schleswig Holstein* and *the Federal State Commissioner for Refugees* discussed the closure of the different EU borders to refugees. As was stated in the announcement for and during the event, the closure of the shorter ways to reach EU-Europe, such as the way through Turkey and Greece, leads to the establishment of routes that are of higher risk to human life. At the same time, the need for smugglers who provide transport along these routes increases. With that basic assumption, the event introduced the background to several escape routes, such as the so-called Balkan Route, the former Turkey-Greece path using the example of Lesvos, and the Libya-Italy route. In addition, the numerous agreements between the EU and African countries were outlined. Stefan Schmidt, representative for *Refugees, Asylum and Immigration Affairs in Kiel*, chaired the event and around 80 people attended. Harald Glöde, from *borderline-europe*, presented his deep impressions from the situation on the Greek island of Lesvos and spoke about new and old escape routes. Aminata Touré, political scientist and member of the Green Party *Bundestagsfraktion B 90/Die Grüne*, outlined the facts about Libya as a partner in the EU's defense against refugees. Falko Behrens, lawyer and representative of *Diakonie*, expounded the background of the agreements between the EU-Commission and African countries, where development aid is often offered as an incentive to hinder migration between and from African countries.

The seventh event took place on 18 October 2016 in Berlin and was called "For the right of legal ways. Solidarity and support for refugees in Mexico and Europe" (In German „Für das Recht auf legale Wege. Solidarität und Unterstützung für Geflüchtete in Mexiko und Europa"). The cooperation between *borderline-europe, Bildungswerk Berlin of Heinrich Böll Stiftung, Heinrich Böll Stiftung* and *Medico International* aimed at demonstrating the commonalities of different border regimes as distant from each other as Mexico/USA and EU-Europe. However, both borders use similar tactics to discriminate against and criminalize migrants, migration and their facilitators. Activist groups from Mexico were present throughout the different panel discussions, such as the *Caravana de las madres de migrantes desaparecidos* (Caravan of the mothers of disappeared migrants), which is part of the project *Movimiento Migrante Mesoamericano* represented by Marta Sánchez and Fray Tomás González. As head of the migrant housing and shelter *La 72* in Tenosique/ Mexico, Fray Tomás González underlines the importance of humanitarian, as well as legal assistance to people on the move, whereas the Caravana raises public awareness of the situation faced by the disappeared and their families left behind. Similar to the project of the Caravana, a group of Italian activists, represented at the event by Gianfranco Crua, spoke about how they organized a first caravan crossing Italy to claim rights for migrants and the right for safe travel routes. Vera Wriedt and Marc Speer from *Moving Europe* reported on the situation of people on the so-called Balkan Route and Greece. Frank Dörner, a representative for *Sea Watch*, introduced the situation in the Mediterranean Sea. The European activists reflected on the difficulties of providing humanitarian assistance while not wanting to support the border regime, which creates the need for humanitarian assistance. Overall, the event consolidated discussions about smuggling and escape aid from each of the different panels and agreed upon the need to provide humanitarian assistance and claim political change at the same time. More than 100 people participated in the event and contributed to a lively debate around the various consequences of restrictive

border and migration regimes. Finally, possibilities to connect activism and different means of political action to improve the situation of refugees and migrants on a global level were discussed in workshops.

The eighth event, which took place on 1 December 2016 in Vienna, was entitled "Paths to Europe – Between Granting Protection and Border Control" (In German "Wege nach Europa- Zwischen Schutzgewährung und Grenzsicherung") and addressed those citizens who had not yet engaged with EU-European migration policies in detail. In that context, Norbert Kittenberger, head of the legal unit of *Asyl in Not*, provided explanations on the developments concerning the current escape

routes to EU-Europe. During the long *Summer of Migration* in 2015, a significant number of refugees, mostly from war zones and unsafe third countries, overcame the EU-European external borders and challenged the control demands of the EU-European border regime. More than a year later, the road to EU-Europe became increasingly difficult, more expensive, and more dangerous. However, despite the alleged closure of the so-called Balkan Route, the movement of migration continues to find pathways into the EU.

Against this background, the event presented the currently used escape routes and pointed out the ways that will possibly increase in importance in the future. To this end, the "border protection" measures, e.g. the "push backs" at sea and the agreement between the EU and Turkey were explained. Finally, the event focused on the Austrian response to migratory movements in the form of an Emergency Decree (*Notverordnung*), which will enter into force after the number of 37,500 asylum applications in one year is reached. The presentation illustrated the envisaged practical implementation and depicted risks for persons who facilitate unauthorized entry to Austria.

The discussion on pathways to EU-Europe illustrated the lack of legal access, such as for example, the process of making an application for asylum, and thus continued a debate on the need for escape assistance.

The ninth event was an "Information event concerning the closure of EU borders by the example of Melilla" in Berlin on 6 February 2017 marking the third anniversary of the death of fifteen people who tried to reach the European Union by swimming to the Spanish enclave Ceuta. At that time, border police confronted the swimmers with tear gas and shot at them with rubber bullets, causing the people to drown. The brutality and inhumane violence of the EU-European border regime, exemplified in that instance by the Spanish Guardia Civil, reached its climax as the border guards were not condemned by the Spanish authorities for the killing of the people.

Abou Bakar Sidibe, protagonist and co-author of the film *Les Sauteurs - Those Who Jump* (2016), spent months living in the mountains by the second Spanish enclave Melilla before he was successful at fleeing to Spain in order to reach Germany. He talked about his experiences and of the brutal way violence is enacted by the border regime between Spain and Morocco. Also, Kai Brokopf, who lived in Melilla from 2015 to 2016, reported on his experiences in the context of Melilla as an outpost of Fortress Europe. Both their experiences and knowledge were put into a broader context, without losing focus on the situation in this small Mediterranean city and what it means to live there. Although during this event, the topic of "smuggling" and escape aid was not dealt with in particular, it still revealed the contradictions between the EU's declaration to respect and defend human rights and the actual violation of human rights which goes as far as the killing of people in the name of "border protection." The event was initiated by the *Bildungswerk of Heinrich Böll Stiftung Berlin* in cooperation with *borderline-europe* and *Alarmphone Berlin*.

The last event occurred in Catania (Italy) on 27 February 2017 under the title "From being trafficked to being imprisoned: The forced alleged smugglers" (In Italian: "Dalla tratta al carcere: Gli scafisti forzati").

The initial point of departure for this third event in Italy as part of the EACEA KideM project, held in the Platamone Palace, a municipal venue of the city of Catania, was the question: how does one ask for international protection that goes beyond the borders of Fortress Europe when human rights and freedom come into conflict with security policies and EU-European legislation? The participants included the journalist Giacomo Zandonini, who worked on a migration route in Niger and on a humanitarian rescue vessel in the Mediterranean Sea, as well as B., who had been arrested as an "alleged smuggler" in Sicily and now lives in Milan. The participants also included Dr. Coco, a psychologist who has worked with migrants in prison, and Germana Graceffo, a defense lawyer for migrants accused as "alleged smugglers" in Sicily.

From left to right: Zandonini, Biondo, Graceffo, B., De Luca, Coco

Giacomo Zandonini reported on his experiences in Niger about migrants forced to entrust themselves to smugglers to cross the Sahara and the Mediterranean Sea because of the impossibility of choosing legal ways to go to EU-Europe. Next, B., a Senegalese migrant who was arrested after his arrival in Italy as an alleged "smuggler," continued this journey-telling of migrants travelling from Africa to Europe.

He confirmed the stories we heard in the second event about the situa-

tion in Libya, where he was forced to pay a trafficker and to use a GPS for navigation during the journey. Only with the help of his engaged lawyer, Marcella De Luca, also present in the meeting, was he released. His arrival in Europe, as well as the investigations and the procedure that ended with his acquittal illustrated again the ineffectiveness and violence of criminalization policies implemented by Italy, which do not distinguish the smugglers from the real organizers (traffickers), and as a result, end up punishing those who should be protected.

Germana Graceffo, lawyer of the non-profit NGO *Borderline Sicilia*, analyzed the legal point of view and described the procedures of alleged smugglers, who in reality, turn out to be victims of trafficking. The importance of ensuring individual protection, of fighting institutional racism and of undertaking an in-depth analysis of individual cases was reaffirmed in light of recent practices implemented by several lawyers who face such situations with increasing frequency due to the high number of arrests.

The state of abandonment and lack of protection in jail was also touched upon by psychologist Salvo Coco, who carries out his activities in the prisons of Catania and Giarre.

Coco described how the psychological, physical and legal condition of foreign prisoners in jail is systematically undermined by the lack of a possibility of verbal communication due to the lack of interpreters and mediators. This leads to the non-recognition of basic rights, and often also to the implementation of strictly illegal practices, such as the detention of minors in adult prisons. Lack of communication is often re-

placed with the abuse of drugs and sedatives, aimed at keeping those seeking their rights silenced.

The debate was further developed by questions and comments from the audience, and with valuable testimonies from lawyers and workers of organizations operating in the territory, who are in daily contact with migrants arrested and then "released" after a few days, often completely alone and unaware of the proceedings to which they are subjected.

We have come to claim for not criminalizing smuggling. We have come to call smugglers facilitator´s of escape assistance. We have come to see the criminalization of escape aid as the criminalization of migration. Starting in 1990 with the introduction of the first international smuggling paragraph, we drew a historical outline of the political, legal and discursive developments of and around smuggling, escape assistance, trafficking and counter-movements up until January 2017. Most importantly, we conducted research on national legislation in Austria, Germany, Italy and Greece, observed numerous court trials and organized activist events for the public. Our aim was to provide information on the controversies surrounding EU-European migration politics, especially those related to the "crime" of smuggling. At the heart of this project are the country reports, which give a detailed description of the criminalization of migration and escape aid in each respective country.

At the beginning of the report (see chapter 2.1) we demonstrated how the international law concerning smuggling and escape aid, namely the United Nations' (UN) *Smuggling of Migrants Protocol*, was translated into EU-European law in the form of the *Facilitator´s Package*. The most notable difference between the two legal frameworks is how they relate to commercialized and free-of-charge facilitation of illegalized border crossings. While we consider it more important to ask whether the facilitation of entry is safe rather than whether it was paid for, the UN *Smuggling of Migrants Protocol* makes clear that free-of-charge escape aid must not be considered a crime, but should rather be seen as humanitarian aid. Gaining financial profit out of any border crossing facilitation, in contrast, is considered as smuggling and must be criminalized by the signatory states of the UN Protocol.

Agreeing on the position that free-of-charge facilitation should be considered as humanitarian aid, we additionally suggest considering smuggling as an informal economy that is not only dependent on its providers, the so-called smugglers, but also on the circumstances that create the market. In the context of this documentation, the latter refers to the ever-increasing closure of borders. In the case of escape assistance, smugglers will provide the safest possible travel routes, take care of their passengers and ensure that people arrive at their destination, healthy, alive and in good condition. We therefore suggest that safe commercialized escape assistance should also be considered as humanitarian, even when such action is not necessarily driven by humanitarian motives, but nevertheless responds to humanitarian needs.

Range of punishment

The EU´s *Facilitators' Package* does not consider any facilitation of undocumented entry, transit or stay as humanitarian, but instead criminalizes any form of escape aid. In this perspective, it is stricter than the UN *Smuggling of Migrants Protocol*, especially as the *Facilitators' Package* enables the EU Member States to independently decide in their national legislation if they want to sanction free-of-charge facilitation or consider it as humanitarian aid in accordance with the Geneva *Refugee Convention* (see chapter 2.1). Furthermore, the sanctions themselves are defined only in terms of minimum charges, which lead to some Member States, such as Italy and Greece, imposing comparably high punishments for the facilitation of border crossings or escape aid. Both legal frameworks were designed in the wake of tragic historical incidents in EU-Europe and internationally, which served as a justification for the criminalization of "smuggling" – the term used in the UN *Smuggling of Migrants Protocol* for escape assistance - and facilitation of illegal entry or transit as it is called in the *Facilitators' Package*. In the

analysis of the legal documents, there is a notable discrepancy between the EU´s declaration to be a space of "Freedom, Security and Justice", the UN´s declaration to respect the human rights of migrants and the de facto criminalization of support for border crossings.

Public discourse vs legal definition of smuggling and trafficking

It is also important for a wider analysis of the criminalization of escape aid and undocumented migration to highlight the difference between smuggling and trafficking (Chapter 2.1). The EU´s dominant political, legal and public discourse tries to represent "smugglers" as responsible for a) illegal migration, b) abuse of migrants, and c) for the high number of people drowning in the Mediterranean Sea. However, the UN *Smuggling of Migrants Protocol* and the UN *Trafficking of Persons Protocol* defines smuggling as happening with the consent of the smuggled person. Smuggling per se is not considered to cause any physical or emotional harm to the people transported. In contrast, the trafficking of persons always involves coercion and, in many cases, forced labor, exploitation, physical and sexual abuse and other forms of torture. It does not necessarily involve the crossing of borders but can take place within a nation-state's territory. From that simple differentiation, it becomes clear that smuggling is less an activity that inevitably results in harm for the person that is being smuggled, but rather represents a violation of nation-state sovereignty, which includes the power of the state to restrict the movement of people from and into its territory. The sovereignty of the nation-state does not recognize everybody's right to a freedom of movement. While it cannot be ignored that the informal smuggling economy bears high risks for the people in need of it, we suggest using the term trafficking when a smuggling operation involves the abuse of people. The usage of the terms "smuggling" and "trafficking" in public discourse, which are often treated as synonymous concepts, confuses the differences between the two and leads to the representation of smuggling as a major offence that harms people,

and not only a violation of nation-state sovereignty. Furthermore, there exist legal frameworks to criminalize abuse, exploitation, murder and other forms of felonies that might occur during a smuggling operation, or as we prefer to say in these cases, during trafficking operations. In order to punish those crimes, it is not necessary to prosecute them as part of a smuggling offence; laws punishing such behavior which are already in place can be used. The representation of smuggling as a major criminal offence helps to morally justify its criminalization, even if the escape assistance was enacted for humanitarian reasons only.

We outlined specific events that exemplify the results of the criminalization of the facilitation of illegalized border crossing, such as the actions against the Refugee Protest in Vienna and the criminalization of escape aid in Germany, as seen in the case of Hanna L. Other decisive moments of criminalization were found in Italy in 2007 with the case of *Cap Anamur*, where the crew of a German rescue boat was sentenced for rescuing people in distress at sea. The *Farmakonisi* case in Greece demonstrates how states use prosecutions against alleged smugglers in order to cover up their own unlawful acts: a young Syrian man was accused of being responsible for the drowning of eight persons at the Greek coast in 2014, whereas they actually died as a result of an illegal push-back operation enacted by the Greek authorities.

Political construction of "the smuggler"

Beyond the legal prosecution of individuals or collectives that enact escape assistance and the public, legal and political construction of the "smuggler" trope, increasingly harsh political measures were taken to prevent illegalized migration and "combat the smuggling industry" (Chapter 2.3). We described and analyzed the emergence of the EU Action Plans, such as the *Ten Point Action Plan on Migration* and the *EU Action Plan against the Smuggling of Migrants*. Both Action Plans form part of the *European Agenda on Migration* from 2015 and were brought

into being as a consequence of the sinking of two boats with more than 900 people on board in April 2015. Thereafter, the fight against smuggling was declared a priority for migration policies. Furthermore, these Action Plans construct smuggling as a security threat. Whereas the process of smuggling can indeed result in situations in which the security of the transported people is endangered, the Action Plans are mainly concerned with the security of the nation-state borders, as outlined above.

Interestingly, the Action Plans recognize the fact that people are forced to travel on insecure routes as there are no safe routes available. Yet, the Action Plans present "resettlement programs" as a solution, even though there is no resettlement program that offers enough space for the high number of people in need of safe routes. Moreover, the Action Plans make use of categories that divide people into "illegal migration" and the ones clearly in need of international protection. As demonstrated with the example of the selective border closures during the *Summer of Migration* in 2015, which allowed people of certain nationalities to pass borders whereas other were denied entry, such measures are highly dependent on the respective political, economic and social situation, not of the country of origin, but of the EU country in which people transit or arrive. Such border closures are highly arbitrary since a person`s country of origin does not really indicate whether a person is in need of international protection. Nonetheless, certain nationalities are represented as "bad" refugees, who are "only'" looking for better living conditions and are not in real need for protection. These divisions between "bad" and "good" refugees are found in the Action Plans and in all further researched documents and political declarations inside the EU.

The militarization of the fight against smuggling, manifested in the *EUNAVFOR MED Operation Sophia* in the Mediterranean Sea, is not preventing further losses of life at sea. The operation is embedded in

the EU-European externalization strategies, implementing EU-European border control measures outside of EU territory. We highlighted the example of Libya and its cooperation with Italy on border control, as the *EUNAVFOR MED* mission is providing training for the Libyan Coast Guards in order to hinder "illegal migration." There have been reports of numerous incidents where the Libyan Coast Guard attacked non-governmental rescue boats and freelance journalists put in evidence that the Libyan Coast Guard cooperates with local traffickers (Chapter 5). When the fight against alleged smugglers continues despite the cost of life, its humanitarian cover loses credibility. Also, the allegations of *Frontex* and the EU accusing humanitarian rescue organizations of cooperating with Libyan smuggling militias lack any factual basis (Chapter 2.3). However, it testifies again to which extent migration itself, smuggling and even humanitarian aid are criminalized to "protect the borders." The violence committed by states, allowing the drowning of people off their coastlines and even directly contributing to the death of people through attacks such as in the Libyan case or push-back operations that lead to the capsizing of the boats such as in the *Farmakonisi* case, is made invisible by *Frontex*, the Libyan Coast Guards and the EU.

A further extension of *Frontex*'s powers in operational and even legal political decision making was implemented in 2015. As *Frontex* is allowed to tell EU Member States which measures to take in order to protect its borders, a further loss of democratic control in terms of policing is to be expected. Again, the anti-smuggling discourse is used to morally legitimate the granting of increased responsibility to an EU agency, whose first mandate is to protect borders, not people or human rights in general. Additionally, *Frontex* itself recognizes that the intensification of border controls only leads to an increase of dangers. If people are forced to secretly travel on highly controlled routes, the travel conditions can worsen because travel has to take place over night or under bad weather conditions. Besides, as we can clearly see in our

analysis, the closure of the so-called Balkan Route realized through the EU Turkey deal forces more people to take the more dangerous route through Libya and elsewhere.

1. COUNTRY REPORTS – A COMPARATIVE ANALYSIS

As previously mentioned, the centerpiece of this documentation consists of the country reports. Each country report outlined the historical backgrounds of the respective legal framework to criminalize escape assistance. In Germany (Chapter 4) and Austria (Chapter 3), the public discourses and legal definitions on escape assistance can be traced back to the Second World War and the Cold War. During the Second World War, helping Jewish people and others persecuted by the Nazi-regime was a crime easily punished with a death sentence. Yet, this trend saw a reversal in the years following the war: Escape helpers who provided escape assistance during that time were celebrated as heroes. Also during the Cold War, escape assistance provided to people fleeing from the Eastern GDR to the Western FGR was legalized by the Federal German Republic (Chapter 4). Escape helpers could even claim a remuneration for their services before the court and were not considered "exploitative smugglers" (Chapter 4). What the country reports for Germany and Austria manage to demonstrate is the shift in politics concerning escape assistance. Both country reports show how the opening of the "Eastern Bloc" borders and the humanitarian crisis caused by the war in former Yugoslavia were used as a justification to implement stricter rules on escape assistance. "Human smuggling" was now identified as a problem, which is also reflected in the emergence of the UN *Smuggling of Migrants Protocol* and the EU's *Facilitators' Package* (Chapter 2.1). One major change in, for example, Austria's legal framework is to be seen in the division of human smuggling as a criminal and an administrative offence, differentiated according to whether or not any form of personal profit was made. Furthermore, from 1997 onwards, every form of human smuggling in Austria that included any form of

"personal benefit" became punishable by imprisonment or a fine as a criminal offense. Austria's current legislation on human smuggling does not adequately differentiate between transport for commercial reasons and transport for humanitarian reasons, as does the *UN Protocol against the Smuggling of Migrants* suggests. Instead, it takes the *Facilitators' Package* discretionary provision literally and criminalizes all escape assistance.

Germany differentiates in its legal framework between the "facilitation of illegal entry," "smuggling of migrants" and "commercial and organized smuggling." Similar to Austria, the laws concerning escape assistance or, as called in Germany the "facilitation of illegal entry," were tightened between the early 2000's and today. The "facilitation of entry" criminalizes any form of assistance performed without getting any form of personal benefit. A humanitarian exemption is not granted, even if the transported person wants to seek asylum in Germany and thereby legalize his or her entry. Similarly, the German law also interprets the EU's *Facilitators' Package* in the most restrictive way, not granting exemptions for humanitarian assistance to entry. Furthermore, both countries suggest a minimum penalty for the smuggling of persons that ranges from three months of imprisonment to up to 10 years when aggravating circumstances are added to the basic smuggling crime. These aggravating circumstances can either refer to any form of coercion or torture enacted upon the smuggled persons during the transport, or to repeated smuggling for commercial reasons, which usually leads to the characterization of the "smugglers" as organized crime group before court.

In a comparison of the examined cases in Austria and Germany, we were able to observe the variety of criminalization of escape assistance, as well as the various motives for helping other people cross borders. Austria and Germany mostly condemn "facilitation of illegal or unauthorized entry" or "smuggling" at their land borders. Several alleged

"smugglers" were arrested for transporting people by car from Italy to Austria to Germany, in some cases with the aim of going to Denmark or Sweden. The criminalization ranges from taxi drivers, to commercial escape helpers to family members. In Austria, four basic categories of trial proceedings could be identified, which also partly apply to Germany: the examined trials found border crossing operations 1) to be of "torturous conditions", 2) to contain elements of commercial nature and criminal organization, 3) to testify to humanitarian motives, and 4) to involve appropriate transport fee.

Exceptional cases which had led to death or involved torturous conditions for the transported persons were not observed during the research period. The Austrian case of 2015, in which a lorry was found containing 71 people who had died because of the terrible travel conditions, had caused a justified outcry. It should be noted that no similar case occurred in Germany during the researched period.

In both countries, we noted a tendency in verdicts, where anyone who (continuously) gained a financial or any other form of benefit from the transport of persons was given a prison sentence. The trial observations have also shown that even loose economic or social ties between accused persons were considered as evidence of a "criminal organization" and therefore qualified for aggravating circumstances.

In both countries, the trial proceedings observed included the facilitation of border crossings for humanitarian reasons. Contrary to Austria, German law does not even grant exemption to the facilitation of unauthorized entry to what could be described as a narrowly construed family constellation. This only includes spouses, children and parents (Chapter 4). When two brothers of Syrian heritage were convicted for facilitating the illegal entry of their son and nephew from Austria to bring them to Germany, the absurdity of the criminalization of escape assistance becomes visible. In the German and Austrian trial proceed-

ings observed, both courts took humanitarian motives only into account as mitigating circumstances. Therefore, it is left to the discretion of the judges, prosecutors, and defense lawyers of both countries to decide whether to acknowledge and accord weight to humanitarian motivations in "smuggling" trials on a case by case basis.

In 2014, the Austrian Supreme Court took a remarkable and exceptional decision concerning the criminalization of "human smuggling:" people who transport persons for an "appropriate fare" rather than for "unjust enrichment" are discharged. Yet, the verdict did not define what amount of fare was "appropriate." In the observed cases where no information on the amount of financial gain was provided, most judges decided against the defendants, showing a tendency to nevertheless penalize any kind of financial remuneration. However, the decision of the Supreme Court can be said to have opened a window for legally challenging the tendency to punish all acts of escape aid/facilitation of free movement.

Certainly, the tightening of the "smuggling" laws in Germany and Austria must be seen in the context of a EU-Europeanization of migration politics, starting in 1990 with the creation of the *Dublin Convention*. The latter came into force in 1997 and was reformed firstly in *Dublin II* in 2003 and then in *Dublin III* in 2013. The *Dublin* regulations determine that every person seeking asylum in EU-Europe had to do so in the first country of arrival,[1] which meant that the migration situation in Italy and Greece changed drastically. The construction of the external Schengen borders, a consequence of the EU-Europeanization of asylum and migration politics, shifted the responsibility for controlling the EU

1 There are certain exemptions from this rule. The first country of arrival rule does not apply in certain narrowly defined circumstances. If the parents of an unaccompanied minor, for example, are in another EU Member State, the minor is allowed to continue his/her travel to join them. To seek further information about the *Dublin* regulations, see "Why Dublin doesn´t work" (http://www.cidob.org/en/publications/publication_series/notes_internacionals/n1_135_por_que_dublin_no_funciona/why_dublin_doesn_t_work. [Last access 10.04.2017].

external borders to countries at the periphery of the EU territory. Italy and Greece were hence pressured to increase their border controls and tighten their migration laws. Both countries, previously known as emigration countries inside EU-Europe, became from the 1990s onwards suddenly responsible for processing a rising number of asylum claims. As their asylum systems in place were rather rudimentary, the one-sided responsibility placed on the peripheral countries within the EU border control and asylum regime resulted in a lack of compliance from these countries (Chapter 5 and 6).[2]

Italy

The Italian report confirms, and even accentuates, the tendency which the German and Austrian country reports laid bare, namely that the criminalization of escape helpers leads to the criminalization of migration itself. In 1998, Italy's immigration act condemned different forms of aid, promotion and facilitation of "illegal entry" and made the offence punishable with a maximum of 15 years' imprisonment. Aggravating circumstances such as repeated facilitation or association with a criminal organization could increase the penalty. Since the passing of the *Bossi-Fini* law in 2002, the criminalization of undocumented entry and its assistance has been increasingly toughened. In 2004, the prosecution of humanitarian sea rescue agencies and fishermen (see the *Cap Anamur* case and the Tunisian Fishermen case chapter 2.2) had deadly consequences. People were not rescued because of the agencies' and fishermen's fear of being criminalized. The first positive change towards a de-criminalization of sea rescue assistance in general took place with the implementation of Italy's sea rescue mission *Mare Nostrum*. Yet, even though *Mare Nostrum* contributed to saving

2 The *Dublin* system is highly dysfunctional, and in 2016, there were calls to suspend Greece from the Schengen zone. Countries like Greece and Italy adopted a strategy of transit in the wake of rising numbers of refugees arriving in Europe. This meant that they would not register asylum-seekers after their arrival in order to avoid being responsible for processing their claims.

people in distress at sea, its second aim concerned the arrest of alleged smugglers on the boats. With the end of *Mare Nostrum* and its replacement by the *Frontex* missions *Triton* in 2014, the concept of rescue mission faded even more into the background while the arrest of alleged smugglers was put at the top of the agenda of the *Frontex* missions. In the Italian country report, we were able to highlight the specific situation of a country at the external borders of the EU, where so-called smugglers were actually also people fleeing from unjust conditions. It is here that the absurdity of the *Frontex* missions and Italy´s legal frame becomes visible, as the prosecution of alleged smugglers leads to the criminalization of the very people seeking protection in the EU. Articles 10 and 16 of the legislative decree n. 251 from 2007 establish that those condemned for aiding irregular immigration, according to the meaning outlined in Article 12 of the Immigration Act, are excluded from international protection. This can result in a critical situation in which the alleged "smuggler" who has escaped from a situation of torture and abuse in Libya or elsewhere, was forced to drive the boat and is, according the law, denied the chance to seek asylum in EU-Europe. Human traffickers in Libya, who effectively make profit out of people in need of protection and abuse them, will not be hindered in their business through the criminalization of "boat drivers". In contrast to Germany and Austria, where border controls inside the Schengen area are conducted through controls in train station and highways, the arrests of "smugglers" in Italy are occurring directly on the arrival of boats, and sometimes even during rescue operations. We observed how in numerous cases the physical and psychological conditions of the arrived persons were by no means appropriate for a police investigation at that point. The Italian Navy, the different and specialized police units, *Frontex* and *EUNAVFOR MED* officers cannot be entitled to use their police and military power to violate the human rights of people in distress. We observed how these institutions put humanitarian search and rescue missions under pressure and seek repressive legal measures to hinder those missions' work. More death and an increase

in missing persons can be the consequence of the criminalization of migration, escape assistance and humanitarian search and rescue operations.

We demand that migrants who are forced to drive vessels to Italy are defined as victims of human trafficking. Occasional "boat drivers" must not be excluded from receiving international protection. Instead, we demand processes with greater legal safeguarding in gathering evidence for charges against the alleged "boat drivers." The ban on international protection must apply only to traffickers, without barring international protection for those who have physically carried out the activities.

Greece

The case of Greece is peculiar in that the country implements the harshest laws on smuggling in the EU-European context. Similar to Germany, Austria and Italy, the severity of the punishment for the assistance of illegalized entry to Greece was increased since 1991, when the first definition of facilitation of illegal entry was introduced into Greek criminal law. At the time, the sentences foresaw an imprisonment of up to three months and a fine. Aggravating circumstances included commercialized transport and official travel agents. Interestingly, the "illegal exit" from Greek territory is punishable in the same way, even though the "facilitation of illegal exit" was not defined. In 2001, an amendment to the law made clear that not only the facilitation of illegalized entry by boat or land is considered a crime, but also the facilitation of transport inside Greece and to other EU Member States. This notable change can only be seen in the context of the EU- Europeanization of migration policies and the intention of the inner EU-European countries to restrain any form of transit migration. In 2009, another amendment upgraded all the forms of offence of "facilitation of entry or exit" from a misdemeanor crime (*Plemelima*) to a felony crime (*Kakourgima*), as was

the case in Austria. In Greece however, this change had significant consequences for the punishment of facilitation of illegalized entry. As in all the observed countries, smuggling was increasingly equated to terrorism and organized crime and could carry a penalty of more than 10 years of imprisonment under aggravating circumstances. The upgrading of the offence to a felony resulted in the radical increase of the penalties to up to 10 years of imprisonment for each transported person and in aggravating circumstances to at least 10 years of imprisonment. Therefore, the sentences imposed may reach the maximum term of 25 years of imprisonment provided by the Greek Criminal Code. The law at the time did not differentiate between commercialized or free-of-charge humanitarian assistance to entry. However, as the Aegean Sea was the main route for illegalized entry into EU territory in 2015 and the situation of the people arriving in Greece created a wave of (international) solidarity, a de facto de-criminalization of illegalized entry, crossing and exit occurred. As so many people provided free transport and engaged in rescue operations at sea, the law on facilitation of illegal entry was amended by an article that explicitly includes the "humanitarian exception," when facilitation is provided to people in need of international protection. What we learn from the experiences in the *Summer of Migration* in 2015, is that a collective action of solidarity is actually able to change the law. However, in our observation of trials and developments in Greece between 2015 and 2017, we still see that the criminalization of migration and its facilitation remain the main interest of Greek and EU authorities.

Case Studies in Greece and Italy

The special border situations in Italy and Greece are in the foreground of the researched cases in both countries as they have an external sea border. We analyzed the external sea border as a "border space" in which different national-state run institutions such as the Coast Guards and police, EU actors such as *Frontex* and military operations such as

EUNAVFOR MED and *NATO* are involved in enforcement measures against so-called "smugglers" and act as "sea rescue missions." However, civil society sea rescue operations are also intervening in the former monopoly of the national sovereign territory. Often, these private non-governmental sea rescue operations are criminalized for their solidarity and for the humanitarian aid they perform. In our research in Italy, we focused on the arrival of boats on the Sicilian coasts and highlighted the practices of the Italian Coast Guard, the *Guardia di Finanza*, different Italian police corps, new task forces specialized in the arrest of "alleged smugglers," *Europol*, *Eurojust*, *Frontex* and the military operation *EUNAVFOR MED*. We then documented the fates of witnesses, testimony givers and minors, who had been accused of smuggling. The case studies in Greece, on the other hand, reflect the no-tolerance policy towards the facilitation to escape, especially since the closure of the so-called Balkan Route. Any type of facilitating entry or exit is charged with an absurdly high penalty, as shown in the cases of Bernd Keller and *Farmakonisi*. Keller's case provides insights into key elements of Greek court proceedings that reach beyond the specificities of the case. Even though he can be considered an untypical "facilitator," his case sheds light on some of the actual practices and routines in the law enforcement and legal procedures at the Greek-Turkish borders.

Remarkable for the Italian situation is the case of the so-called "scafisti" – migrants who have been forced by traffickers in Libya to navigate boats. A similar practice was observed in Greece, where asylum seekers often agree to drive the boat as an indirect payment to the actual smuggler for their transport. In both countries, there are numerous cases where minors have been prosecuted for the offence of smuggling. Nonetheless, there are important differences, as under Italian law, minors can be excluded from prosecution as smugglers provided that their status as juveniles is proven. The problem is that similar to adult migrants, an increasing number of minors is forced to navigate the boat and to provide food to other passengers. On their arrival, of-

ficials of the Italian Coast Guard often record minors as adults, which makes it hence possible to prosecute them for "smuggling." Those minors criminalized as "smugglers" pass a cautionary period in prison which can last several days to six months. However, in cases where they have a lawyer who is legally able to clarify the date of birth, they are decriminalized.

In Greece, minors are also easily convinced to hold the helm, as they are often promised to travel without payment. Contrary to Italian law however, juveniles are punishable for the facilitation of illegalized entry in Greece. Any exception is dependent on the discretion of the investigators and courts involved and their assessment of the criminal liability of the offender. Only they can decide on the charge and mitigating circumstances. Nevertheless, this implies that many minors will be detained pending trial for a period which may last 18 months.

Turning rescue operations into "smuggling" is a practice we already outlined in the *Cap Anamur* case in 2004. A similar tendency is reflected in one of the Greek case studies during the closing procedures of the Balkan Route in early 2016. Five international volunteers were arrested after a rescue operation. This incident marked a change of Greece's border politics. The state monopoly at the sea borders had to be re-imposed after a period in which rescue operations and the reception of newly arrived migrants at the islands was to a large extent undertaken by independent volunteers, solidarity initiatives and by NGOs. After the incident, a political dominant discourse emerged targeting "lawful" and "suspicious" volunteers in order to justify repressive measures against specific volunteer groups. Verbal harassment by authorities, including threats of arrest, arbitrary house search and other rights abuses were reported (Chapter 6). In late January, a joint Ministerial Decision prohibited all activities of unregistered volunteers at army-led reception camps and implemented a system of "NGO certification" based on an extensive profiling of their members.

While our findings and analyses of the current situation of the EU-European border regime and the criminalization of escape assistance draw a rather negative picture when it comes to justice and human rights inside the space of "Freedom, Justice and Security," we also observed an increase in solidarity with the people forced to move and the ones who are willing to provide means of transport for them. As shown in the Austrian and German country reports, for example, resistance against this criminalization is practiced through media campaigns such as *Fluchthelfer*in*,[3] and *Fluchthilfe & Du*.[4] Furthermore, resistance takes place on a legal level where advocates, lawyer associations,[5] and court decisions in every researched country work against the criminalization of escape assistance.[6] Information on individual cases where lawyers defend criminalized escape facilitators, and wide-ranging court decisions can be found in all the country reports. Also, activism and resistance in the field of arts is found in several places. Theatre plays on "smuggling" and resistance are shown on several stages across Europe. The movie *Io sto con la sposa* even documents an illegalized border crossing through different EU-European countries and tells the story of the migrants and the solidarity movement around them.[7] In addition, collective and free cross-border transportation has been organized publicly through social media channels, such as the Refugee convoy Vienna.[8]

3 http://www.fluchthelfer.in/?lang=en [Last access 16.02.2017].

4 http://www.fluchthilfe.at/ [Last access 16.02.2017].

5 http://www.rav.de/verein/selbstverstaendnis/ [Last access 16.02.2017].

6 Information on individual cases where lawyers defend criminalized escape facilitators, as well as further information on the "Republikanischer Anwältinnen und Anwälte Verein" and impacting court decisions can be found in all the country reports.

7 „On the Bride's side," http://www.iostoconlasposa.com/en/ [Last access 16.02.2017].

8 https://www.facebook.com/refugeeconvoy/ [Last access 16.02.2017]

The following section can therefore be understood as a summary of resistance that should inspire further activism.

3. MEDIA CAMPAIGNS AND PUBLICLY ORGANIZED TRANSPORT FACILITATION

Similar to the campaigns *Fluchthilfe & Du* and *Fluchthelfer.in*, which are described in detail in the German and Austrian country reports, the *Refugee Convoy. Schienenersatzverkehr für Flüchtlinge* organized more than 170 cars to transport people from Budapest to Vienna. This occurred in September 2015 when the borders where temporarily open, but no public transport was available. The event was publicly announced on the social media channel *Facebook* and well-documented through several other forms of media. When the transport took place on 6th of September 2015 in Austria and Hungary, the police was present and did not show any intention to hinder the action. However, three of the 300 participants who cooperated with the police authorities were later on criminalized as so-called "smugglers" and was taken to court. The group strictly rejected the condemnation of their actions and described themselves as "a service webpage for all those who want to provide escape aid free of charge and in solidarity with people in need."[9] As they underlined, the criminalization of the three activists lacked any rational justification since the official authorities did not intervene in the action taking place and were neither trying to prosecute all of the people participating in the convoy, nor the public transport such *ÖBB Austria* and other Bus companies, who also provided escape aid. They claimed: "We offer help and support to people on the flight and will continue to do so (ibid.)."

Following their example, other calls for convoys were made through

9 „Serviceseite für alle, die unentgeltlich und solidarisch Fluchthilfe für Menschen in Not anbieten wollen." (ibid.)

Facebook, such as the *# OpenBorderCaravan,*[10] and *Convoy of Hope,*[11] which organized collective private transport across borders in September 2015.

*Become an escape agent and support people on their way to a better future! For instance, you could give refugees a ride in your car while returning from a holiday in southern Europe. "*Freedom is a necessary requirement for justice", stated German president Joachim Gauck in his inaugural speech. As long as the iron curtain existed, it was consensus among Western politicians that the right to freely cross borders was a crucial element of a democratic society. But the people who are fleeing today, across the Mediterranean Sea and under deadly conditions, seem not to be entitled to this right. In fact, the so-called Dublin II regulation even prevents refugees and migrants from moving around within our free and democratic Europe once they have reached it. Can it be just to restrict people's most basic freedoms only on the basis of their nationality? Who actually decides, which person deserves a better life, and which person does not? In East Germany there were people who illegally helped persons flee to the West. Today, the work of these 'escape agents' is considered honorable and just. How will today's flight helpers be judged in 25 years? Flight facilitation remains legitimate, and indeed indispensable for a free and just society, wherever people are reduced in their freedom of movement. This is especially true for a free and just society, like the EU wants to become. "Those who deny freedom to others, deserve it not for themselves" (Abraham Lincoln). As escape agents you can help to make a free society become reality. Within the Schengen Area this does not carry any significant risk and is even relatively easy to do. We know many people who have helped people flee out of their country. But we also know of many ministries and police agencies that are rattling their sabres to prevent this. But this is not a game. For some refugees it is a matter of life and death.[1] (Fluchthelfer.in 2015).

1 Fluchthelfer.In 2015: Become an Escape agent. http://www.fluchthelfer.in/?lang=en [Last access 16.02.2017].

10 https://www.facebook.com/events/900238360067585/ [Last access 16.02.2017].

11 http://prisma.blogsport.de/2015/09/14/convoy-of-hope-fluchthilfe-konvoi-aus-leipzig-nach-ungarn-gestartet/ [Last access 16.02.2017].

Other than such big collective actions enabled through the wave of solidarity arising in the *Summer of Migration*, many activists were not able to publicly announce their transport facilitation and, as we demonstrated, are facing severe criminal persecution. What is of similar importance is that most of the transport facilitators who were forced to flee themselves and/or are providing transport service out of economic necessity, are usually not enjoying the support of big media and solidarity campaigns, but have to rely on the services of motivated lawyers to defend them.

However, people accused of being "smugglers" in Greek prisons, for example, organized protests against the restrictive legal framework in Greece by initiating a hunger strike. They demanded a change in the high penalties and asked for a revision of their cases (see chapter 6). In Greece as well, the Spanish drivers Mikel Zuloaga and Begoña Huarte are facing a condemnation for "smuggling." To defend their actions an online campaign was started in December 2016. They understand their act – the driving of eight persons through Greece with the aim of reaching Italy - as an act of civil disobedience against the unjust EU-European migratory politics. As they announce on the campaigns website, this was done in solidarity with migrants and trying to defend human rights.[12]

Further campaigns aim at fighting the criminalization of solidarity, as is the case with the Spanish firefighters Manuel Blanco, Julio Latorre, Enrique Rodriguez and Lisbeth Zornig who were involved in a life-saving deed off the shore of Lesvos (Chapter 6). After saving people from drowning in the sea, they were accused of being "smug-

12 https://www.change.org/p/justicia-griega-libertad-para-mikelon-y-bego-31fc8ef5-bbd1-4a87-972a-fd6e4967dfab?recruiter=53162384&utm_source=share_petition&utm_medium=facebook&utm_campaign=share_facebook_responsive&utm_term=mob-xs-no_src-no_msg [Last access 16.02.2017].

glers" in Greece. The campaign *WeMove.EU*[13] tries to raise awareness about their situation and wants to free them from any legal persecution. Their court cases attracted international attention and on 5th of July, the Deputy Minister for Migration Policy, Christodoulopoulou, introduced an amendment which excluded practices of humanitarian assistance from prosecution. The revision specifically concerns cases in which the transportation of undocumented migrants is undertaken for the purpose of enabling them to carry out the registration process.

5. ART INTERVENTIONS

In addition to the already mentioned theatre plays *Orpheus in der Oberwelt: Eine Schlepperoper* (Orpheus in the Overground: A Smuggling Opera) (2014) in the German country report and the drama *Heroes. The women. Three life stories. Many interrogations* (2015) presented in the country report for Austria, a theatre play about the *Farmakonisi* Case in Greece was also shown on numerous stages across EU-Europe. The director of the play Anestis Azas describes it as "theatre of reality,"[14] a mix of documentary and fiction which paints the portrait of a EU-Europe of closed borders. The way refugees and migrants are treated by the justice system is demonstrated through the exemplary case of the tragedy off the coast of the Greek island *Farmakonisi* in January 2014 (Chapter 2.2 and 6).

The movie *Io sto con la sposa*, directed by Antonio Augugliaro, Gabriele Del Grande and Khaled Soliman Al Nassiry tells the story of five Palestinian and Syrians, who meet a Palestinian poet and an Italian journalist. Pretending they were part of a wedding party, the five refugees who arrived on the island of Lampedusa are accompanied by

13 https://act.wemove.eu/campaigns/unsung-heroes?utm_source=civimail-4402&utm_medium=email&utm_campaign=20161216 [Last access 16.02.2017].

14 http://www.critical-stages.org/14/refugee-narratives-case-farmakonisi-or-the-justice-of-the-water-by-anestis-azas/ [Last access 16.02.2017]

Italian and Syrian activists who help them to safely arrive in Sweden by car. While the four-day journey through EU-Europe is constantly documented and filmed, the focus of the activist movie lies on the political objective to reach Sweden and to ridicule the "*Fortress Europe*."[15]

The cases referred to here do not only show how escape assistance and solidarity are criminalized, but rather concentrate on the kind of actions people take to support others. Different ways of resisting are carried out on a daily basis and could, if done in ever higher numbers, change the restrictive border regime. What also becomes clear from the given examples, is that the facilitation of illegalized entry is often considered as humanitarian aid and solidarity when it is enacted by EU-European citizens but not when it concerns non-EU-European citizens. When EU-European citizens are criminalized for "smuggling," campaigns are raised to support them, which has not been the case for non-EU-European citizens, who are prosecuted for transporting family members, providing help to friends or for saving their own lives. Hence, we call for the organization of support campaigns and petitions for everybody who is criminalized for performing escape aid!

6. RECOMMENDATIONS

We see that people act in solidarity with those on the move, provide escape assistance for different reasons and risk their own integrity. We observed how civil disobedience is performed, that art interventions and legal interventions call into question the criminalization of "smuggling," the "facilitation of illegal entry," as well as "escape assistance." We see that a critical civil society exists in the so-called space of "Justice, Freedom and Security" and we demand that this space grants the same rights to all the people passing through it or living in it. The controversies in EU-European migration policies make visible that people

15 http://www.iostoconlasposa.com/en/#directors-notes [Last access 16.02.2017].

are not only criminalized for helping others, but also that state violence against people on the move is covered up and made invisible. The enforcement of border controls does not prevent migration, but makes smuggling even more necessary.

Therefore, we call for the immediate consideration of a new EU Council decision that restricts the new *Frontex* mandate, reduces its high budget and, in the long term, abolishes the institution itself. *Frontex* is known since its operational beginning in 2004 to perform illegal push-back operations and to use force against people during its operations. Furthermore, it contributes to the criminalization of migration, escape aid and solidarity with people in need. Moreover, we demand the immediate stop of the *EUNAVFOR MED* mission, which is part of the EU-European externalization of border politics and the militarization of the fight against migration. As the Libyan Coast Guard is known to have attacked rescue operations and thereby caused the death of people, we demand the immediate stop of any cooperation with Libyan border authorities and in general, claim for ending the externalization of EU-European border and migration politics. The repressive methods of the EU-European border regime prioritize control over the individual's right to live, to seek protection and to carry out his right to a freedom of movement. We call for safe travel routes and means for all and we hold the structures of exclusion of the *Fortress Europe* to be responsible for the continuous death of people in the Mediterranean Sea.

As all the researched countries are connected through networks of police and securitizing institutions aimed at controlling and managing migration, and all the Member States are involved in providing military equipment for *Frontex* and the *EUNAVFOR MED* mission, we suggest to rather spend this money on "Ferries not *Frontex*"! The prosecution of so-called "smuggler networks" in Greece, in Italy and Austria and in Germany, is not a singular tendency, as can be seen in the country reports and chapter 2.2. We urge for a discursive and legal

divide between escape assistance, human trafficking and terrorism in order to stop the stigmatization of smugglers as human traffickers and as members of transnational criminal organizations. When the fight against migration is justified as the morally legitimated fight against „bad smugglers," we have to deconstruct this trope in order to challenge the EU-European humanitarian fig-leaf. Moreover, we demand the end of the discursive, legal and political division between "good" and "bad" refugees. We have shown that this status depends only on the respective moment in history, the socio-political and economic situation of the receiving country, as well as the arbitrary perception of the country of origin and has nothing to do with the actual situation of the person seeking protection.

In addition, the discretionary power given to judges, prosecutors, and defense lawyers in deciding whether to acknowledge and accord weight to humanitarian motivations in "smuggling" trials on a case by case basis, or to consider them as "organized criminals," must be amended. This is particularly salient when those actors have different levels of knowledge about migration law, asylum law and human rights, as demonstrated in the third case study in Germany. The extent to which the accused are treated equally in trials in the different countries, especially inside the EU-European context, is questionable. When the penalties for smuggling operations vary to such great degree between the inner EU-European countries and the outer EU-European ones, how can we talk about a common space of "Justice"? As a first step, accused "smugglers" must be enabled to enjoy legal protection in a way that guarantees an appropriate defense. Moreover, the EU's *Facilitators' Packag*e needs to be revised to firstly include a clause for humanitarian exemptions, and secondly, has then to be abolished as a whole as soon as possible. The humanitarian exception in Greece, as well as the Supreme Court case in Austria can be used as an example for a possible decriminalization of smuggling and, in the long term, of illegalized migration.

Smugglers are not just "smugglers." Escape assistance is provided from and for different nationalities. It can be done out of humanitarian motives, because of political convictions as well as personal relations. It is an informal business and can be used to create profit, but as this report has shown, this informal economy only exists due to border closing procedures on different levels and restrictive migratory policies enacted by EU-Europe. The informal business of "smuggling" is therefore a self-produced phenomenon, and the only way to stop it is to respect the freedom of movement for everybody and enable people to travel on legal routes.

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